FORM NLRB-502 (RC)
(4-15)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

RC PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 08-RC-284759	Date Filed 10/18/21

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlrb.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. **PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE -** A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer	2b. Address(es) of Establishment(s) involved *(Street and number, city, State, ZIP code)*
Kenyon College	Ransom Hall OH Gambier 43022

3a. Employer Representative – Name and Title	3b. Address (If same as 2b – state same)
Sean Decatur	Ransom Hall OH Gambier 43022

3c. Tel. No.	3d. Cell No.	3e. Fax No.	3f. E-Mail Address
(740) 427-5336			decatur@kenyon.edu

4a. Type of Establishment *(Factory, mine, wholesaler, etc.)*	4b. Principal product or service	*5a. City and State where unit is located:*
Schools	Higher Education	Gambier, OH

5b. Description of Unit Involved	6a. No. of Employees in Unit:
Included:	600
Excluded:	6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes [●] No [ ]

Check One:

(●) 7a. Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about _____ (Date) *(If no reply received, so state)*.

( ) 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent *(If none, so state).*	8b. Address

8c. Tel No.	8d Cell No.	8e. Fax No.	8f. E-Mail Address

8g. Affiliation, if any	8h. Date of Recognition or Certification	8i. Expiration Date of Current or Most Recent Contract, if any *(Month, Day, Year)*

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? _____

(Name of labor organization) _____, has picketed the Employer since *(Month, Day, Year)* _____.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. *(If none, so state)*

10a. Name	10b. Address	10c. Tel. No.	10d. Cell No.
		10e. Fax No.	10f. E-Mail Address

11. **Election Details:** If the NLRB conducts an election in this matter, state your position with respect to any such election.	11a. Election Type: ● Manual ___ Mail ___ Mixed Manual/Mail

11b. Election Date(s):	11c. Election Time(s):	11d. Election Location(s):
November 8, 2021 and November 9, 2021	10 a.m. to 1 p.m. and 5 p.m. to 8 p.m. on both days	Main Lobby Room, First Floor, Peirce Hall

12a. Full Name of Petitioner (*including local name and number*)	12b. Address *(street and number, city, state, and ZIP code)*
Mark Meinster United Electrical, Radio and Machine Workers of America (UE)	37 S. Ashland Ave Il Chicago 60607

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent *(if none, so state)*
United Electrical, Radio and Machine Workers of America (UE)

12d. Tel No.	12e. Cell No.	12f. Fax No.	12g. E-Mail Address
(773) 405-3022	(773) 405-3022	(312) 829-8307	mark.meinster@ueunion.org

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title	13b. Address *(street and number, city, state, and ZIP code)*

13c. Tel No.	13d. Cell No.	13e. Fax No.	13f. E-Mail Address

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name *(Print)*	Signature	Title	Date
Mark Meinster		International Representative	10/18/2021 11:45:06 AM

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Attachment

DO NOT WRITE IN THIS SPACE	
Case 08-RC-284759	Date Filed 10/18/21

Employees Included
All hourly paid student employees of Kenyon College

Employees Excluded
All managerial employees, guards, professional employees and supervisors as defined by the Act, and all other employees

Form NLRB-5544
(5-2015)

CERTIFICATE OF SERVICE

Employer Name:

Service on the Employer

I hereby certify that on 10/18/2021 (date), a copy of the petition involving the Employer named above, a Statement of Position (Form NLRB-505), and a Description of Procedures (Form NLRB-4812) were served on the Employer by: (check whichever is applicable)

- ☒ e-mail to the email address shown on the petition.
- ☐ facsimile (with the permission of the Employer) to the facsimile number shown on the petition.
- ☐ overnight mail to the mailing address shown on the petition.
- ☐ hand-delivery to _____ (name of Employer's representative) at the following address: _____.

Service on the Other Party Named in the Petition

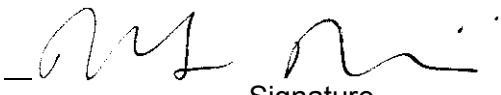
I hereby certify that on _____ (date), a copy of the petition involving the Employer named above, a Statement of Position (Form NLRB-505), and a Description of Procedures (Form NLRB-4812) were also served on _____ (name of party or parties) by: (check whichever is applicable)

- ☐ email to the email address shown on the petition.
- ☐ facsimile (with the permission of the party) to the facsimile number shown on the petition.
- ☐ overnight mail to the mailing address shown on the petition.
- ☐ hand-delivery to _____ (name of party's representative) at the following address: _____.

Service on the Other Party Named in the Petition

I hereby certify that on _____ (date), a copy of the petition involving the Employer named above, a Statement of Position (Form NLRB-505), and a Description of Procedures (Form NLRB-4812) were also served on _____ (name of party or parties) by: (check whichever is applicable)

- ☐ email to the email address shown on the petition.
- ☐ facsimile (with the permission of the party) to the facsimile number shown on the petition.
- ☐ overnight mail to the mailing address shown on the petition.
- ☐ hand-delivery to _____ (name of party's representative) at the following address: _____.



Signature

Mark Meinster, International Rep.

Name and Title

10/18/2021

Date

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 8
1240 E 9TH ST
STE 1695
CLEVELAND, OH 44199-2086

Agency Website: www.nlrb.gov
Telephone: (216)522-3715
Fax: (216)522-2418

Download
NLRB
Mobile App

October 20, 2021

URGENT

mark.meinster@ueunion.org
(312)829-8307
Mark Meinster, International Representative
United Electrical, Radio and Machine Workers of America (UE)
37 S. Ashland Ave
Chicago, IL 60607

Re: Kenyon College
Case 08-RC-284759

Dear Mr. Meinster:

The enclosed petition that you filed with the National Labor Relations Board (NLRB) has been assigned the above case number. This letter tells you how to contact the Board agent who will be handling this matter; explains your obligation to provide the originals of the showing of interest and the requirement that you complete and serve a Responsive Statement of Position form in response to each timely filed and served Statement(s) of Position; notifies you of a hearing; describes the employer's obligation to post and distribute a Notice of Petition for Election, complete a Statement of Position and provide a voter list; requests that you provide certain information; notifies you of your right to be represented; and discusses some of our procedures including how to submit documents to the NLRB.

Investigator: This petition will be investigated by Field Examiner Dreyon O. Wynn whose telephone number is (216)303-7386. The Board agent will contact you shortly to discuss processing the petition. If you have any questions, please do not hesitate to call the Board agent. The Board agent may also contact you and the other party or parties to schedule a conference meeting or telephonic or video conference for some time before the close of business the day following receipt of the final Responsive Statement(s) of Position. This will give the parties sufficient time to determine if any issues can be resolved prior to hearing or if a hearing is necessary. If the agent is not available, you may contact Assistant to the Regional Director NORA F. MCGINLEY whose telephone number is (216)303-7370. If appropriate, the NLRB attempts to schedule an election either by agreement of the parties or by holding a hearing and then directing an election.

Showing of Interest: If the Showing of Interest you provided in support of your petition was submitted electronically or by fax, the original documents which constitute the Showing of Interest containing handwritten signatures must be delivered to the Regional office within **2 business days**. If the originals are not received within that time the Region will dismiss your petition.

Notice of Hearing: Enclosed is a Notice of Representation Hearing to be conducted at **10:00 AM** on **Tuesday, November 9, 2021** via videoconference, if the parties do not voluntarily agree to an election. If a hearing is necessary, the hearing will run on consecutive days until concluded unless the regional director concludes that extraordinary circumstances warrant otherwise. Before the hearing begins, we will continue to explore potential areas of agreement with the parties in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Upon request of a party showing good cause, the regional director may postpone the hearing. A party desiring a postponement should make the request to the regional director in writing, set forth in detail the grounds for the request, and include the positions of the other parties regarding the postponement. E-Filing the request is required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Posting and Distribution of Notice: The Employer must post the enclosed Notice of Petition for Election by **Wednesday, October 27, 2021,** in conspicuous places, including all places where notices to employees are customarily posted. If it customarily communicates electronically with its employees in the petitioned-for unit, it must also distribute the notice electronically to them. The Employer must maintain the posting until the petition is dismissed or withdrawn or this notice is replaced by the Notice of Election. Failure to post or distribute the notice may be grounds for setting aside the election if proper and timely objections are filed.

Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, the Employer is required to complete the enclosed Statement of Position form, have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition by **noon Eastern Time** on **Monday, November 1, 2021.** The Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the Employer contends that the proposed unit is inappropriate, it must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The Employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit.

Required Responsive Statement of Position (RSOP): In accordance with Section 102.63(b) of the Board's Rules, following timely filing and service of a Statement of Position, the petitioner is required to complete the enclosed Responsive Statement of Position form addressing issues raised in any Statement(s) of Position. The petitioner must file a complete, signed RSOP in response to all other parties' timely filed and served Statement of Position, with all required attachments, with this office and serve it on all parties named in the petition such that it is received by them by **noon Eastern Time** on **Thursday, November 4, 2021.** This form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. **This form must be e-Filed, but unlike other e-Filed documents, will not be timely if filed on the due date but**

after noon Eastern Time. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent named above.

Failure to Supply Information: Failure to supply the information requested by the RSOP form may preclude you from litigating issues under Section 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

> A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Voter List: If an election is held in this matter, the Employer must transmit to this office and to the other parties to the election, an alphabetized list of the full names and addresses of all eligible voters, including their shifts, job classifications, work locations, and other contact information including available personal email addresses and available personal home and cellular telephone numbers. Usually, the list must be furnished within 2 business days of the issuance of the Decision and Direction of Election or approval of an election agreement. The list must be electronically filed with the Region and served electronically on the other parties. To guard against potential abuse, this list may not be used for purposes other than the representation proceeding, NLRB proceedings arising from it or other related matters.

Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 days after the date when the Employer must file the voter list with the Regional Office. However, a petitioner and/or union entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483, which is available on the NLRB's website or from an NLRB office. A waiver will not be effective unless all parties who are entitled to the voter list agree to waive the same number of days.

Information Needed Now: Please submit to this office, as soon as possible, the following information needed to handle this matter:

(a) The correct name of the Union as stated in its constitution or bylaws.

(b) A copy of any existing or recently expired collective-bargaining agreements, and any amendments or extensions, or any recognition agreements covering any employees in the petitioned-for unit.

(c) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any.

(d) The name and contact information for any other labor organization (union) claiming to represent or have an interest in any of the employees in the petitioned-for unit and for any employer who may be a joint employer of the employees in the proposed unit. Failure to disclose the existence of an interested party may delay the processing of the petition.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before the NLRB. In view of our policy of processing these cases expeditiously, if you wish to be represented, you should obtain representation promptly. Your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlrb.gov, or from an NLRB office upon your request.

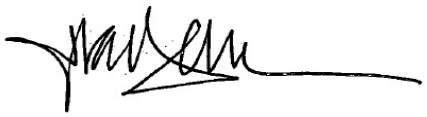
If someone contacts you about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the NLRB. Their knowledge regarding this matter was obtained only through access to information that must be made available to any member of the public under the Freedom of Information Act.

Procedures: Pursuant to Section 102.5 of the Board's Rules and Regulations, parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and/or other evidence, by electronically submitting (E-Filing) them through the Agency's web site (www.nlrb.gov). You must e-file all documents electronically or provide a written statement explaining why electronic submission is not possible or feasible. Failure to comply with Section 102.5 will result in rejection of your submission. The Region will make its determinations solely based on the documents and evidence properly submitted. All evidence submitted electronically should be in the form in which it is normally used and maintained in the course of business (i.e., native format). Where evidence submitted electronically is not in native format, it should be submitted in a manner that retains the essential functionality of the native format (i.e., in a machine-readable and searchable electronic format). If you have questions about the submission of evidence or expect to deliver a large quantity of electronic records, please promptly contact the Board agent investigating the petition.

Information about the NLRB and our customer service standards is available on our website, www.nlrb.gov, or from an NLRB office upon your request. We can provide assistance

for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,



IVA Y. CHOE
Regional Director

Enclosures

1. Petition
2. Notice of Petition for Election (Form 5492)
3. Notice of Representation Hearing
4. Description of Procedures in Certification and Decertification Cases (Form 4812)
5. Statement of Position form and Commerce Questionnaire (Form 505)
6. Responsive Statement of Position (Form 506)

Form NLRB-5492
(Rev: 12-2015)

National Labor Relations Board

NOTICE OF PETITION FOR ELECTION

This notice is to inform employees that United Electrical, Radio and Machine Workers of America (UE) has filed a petition with the National Labor Relations Board (NLRB), a Federal agency, in Case 08-RC-284759 seeking an election to become certified as the representative of the employees of Kenyon College in the unit set forth below:

All hourly paid student employees of Kenyon College but excluding all managerial employees, guards, professional employees and supervisors as defined by the Act, and all other employees.

This notice also provides you with information about your basic rights under the National Labor Relations Act, the processing of the petition, and rules to keep NLRB elections fair and honest.

YOU HAVE THE RIGHT under Federal Law

- **To self-organization**
- **To form, join, or assist labor organizations**
- **To bargain collectively through representatives of your own choosing**
- **To act together for the purposes of collective bargaining or other mutual aid or protection**
- **To refuse to do any or all of these things unless the union and employer, in a state where such agreements are permitted, enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustments).**

PROCESSING THIS PETITION

Elections do not necessarily occur in all cases after a petition is filed. NO FINAL DECISIONS HAVE BEEN MADE YET regarding the appropriateness of the proposed unit or whether an election will be held in this matter. If appropriate, the NLRB will first see if the parties will enter into an election agreement that specifies the method, date, time, and location of an election and the unit of employees eligible to vote. If the parties do not enter into an election agreement, usually a hearing is held to receive evidence on the appropriateness of the unit and other issues in dispute. After a hearing, an election may be directed by the NLRB, if appropriate.

IF AN ELECTION IS HELD, it will be conducted by the NLRB by secret ballot and Notices of Election will be posted before the election giving complete details for voting.

ELECTION RULES

The NLRB applies rules that are intended to keep its elections fair and honest and that result in a free choice. If agents of any party act in such a way as to interfere with your right to a free election, the election can be set aside by the NLRB. Where appropriate the NLRB provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with employees' rights and may result in setting aside the election:

- **Threatening loss of jobs or benefits by an employer or a union**
- **Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises**
- **An employer firing employees to discourage or encourage union activity or a union causing them to be fired to encourage union activity**
- **Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or, if the election is conducted by mail, from the time and date the ballots are scheduled to be sent out by the Region until the time and date set for their return**
- **Incitement by either an employer or a union of racial or religious prejudice by inflammatory appeals**
- **Threatening physical force or violence to employees by a union or an employer to influence their votes**

Please be assured that IF AN ELECTION IS HELD, every effort will be made to protect your right to a free choice under the law. Improper conduct will not be permitted. All parties are expected to cooperate fully with the NLRB in maintaining basic principles of a fair election as required by law. The NLRB as an agency of the United States Government does not endorse any choice in the election.

For additional information about the processing of petitions, go to www.nlrb.gov or contact the NLRB at (216)522-3715.

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED BY ANYONE. IT MUST REMAIN POSTED WITH ALL PAGES SIMULTANEOUSLY VISIBLE UNTIL REPLACED BY THE NOTICE OF ELECTION OR THE PETITION IS DISMISSED OR WITHDRAWN.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

Kenyon College **Employer** **and** **United Electrical, Radio and Machine Workers of America (UE)** **Petitioner**	**Case 08-RC-284759**

NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, a hearing will be conducted before a hearing officer of the National Labor Relations Board at 10:00 AM on **Tuesday, November 9, 2021** and on consecutive days thereafter until concluded, via ZOOM videoconference. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, Kenyon College must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Eastern time on **Monday, November 1, 2021.** Following timely filing and service of a Statement of Position by Kenyon College, the Petitioner must complete its Responsive Statement of Position(s) responding to the issues raised in the Employer's and/or Union's Statement of Position and file them and all attachments with the Regional Director and serve them on the parties named in the petition such that they are received by them no later than **noon** Eastern on **Thursday, November 4, 2021**.

Pursuant to Section 102.5 of the Board's Rules and Regulations, all documents filed in cases before the Agency must be filed by electronically submitting (E-Filing) through the Agency's website (www.nlrb.gov), unless the party filing the document does not have access to the means for filing electronically or filing electronically would impose an undue burden. Documents filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Detailed instructions for using the NLRB's E-Filing system can be found in the E-Filing System User Guide

The Statement of Position and Responsive Statement of Position must be E-Filed but, unlike other E-Filed documents, must be filed by **noon** Eastern on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position and Responsive Statement of Position are not required to be filed. If an election agreement is signed by all parties and returned to the Regional office after the due date of the Statement of Position but before the due date of the Responsive Statement of Position, the Responsive Statement of Position is not required to be filed.

Dated: October 20, 2021

IVA Y. CHOE
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 08
1240 E 9TH ST
STE 1695
CLEVELAND, OH 44199-2086

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Kenyon College **Employer** **and** **United Electrical, Radio and Machine Workers of America (UE)** **Petitioner**	**Case 08-RC-284759**

AFFIDAVIT OF SERVICE OF: Petition dated October 18, 2021**, Notice of Representation Hearing dated** October 20, 2021**, Description of Procedures in Certification and Decertification Cases (Form NLRB-4812), Notice of Petition for Election, and Statement of Position Form (Form NLRB-505).**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on October 20, 2021, I served the above documents by electronic mail and regular mail upon the following persons, addressed to them at the following addresses:

Sean Decatur, President
Kenyon College
Ransom Hall
Gambier, OH 43022
decatur@kenyon.edu

Mark Meinster, International Representative
United Electrical, Radio and Machine
Workers of America (UE)
37 S. Ashland Ave
Chicago, IL 60607
mark.meinster@ueunion.org
Fax: (312)829-8307

October 20, 2021 — Date

SHARON ZILINSKAS, Designated Agent of NLRB — Name

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DESCRIPTION OF REPRESENTATION CASE PROCEDURES IN CERTIFICATION AND DECERTIFICATION CASES

The National Labor Relations Act grants employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity. A party may file an RC, RD or RM petition with the National Labor Relations Board (NLRB) to conduct a secret ballot election to determine whether a representative will represent, or continue to represent, a unit of employees. An **RC** petition is generally filed by a union that desires to be certified as the bargaining representative. An **RD** petition is filed by employees who seek to remove the currently recognized union as the bargaining representative. An **RM** petition is filed by an employer who seeks an election because one or more individuals or unions have sought recognition as the bargaining representative, or based on a reasonable belief supported by objective considerations that the currently recognized union has lost its majority status. This form generally describes representation case procedures in RC, RD and RM cases, also referred to as certification and decertification cases.

Right to be Represented – Any party to a case with the NLRB has the right to be represented by an attorney or other representative in any proceeding before the NLRB. A party wishing to have a representative appear on its behalf should have the representative complete a Notice of Appearance (Form NLRB-4701), and E-File it at www.nlrb.gov or forward it to the NLRB Regional Office handling the petition as soon as possible.

Filing and Service of Petition – A party filing an RC, RD or RM petition is required to serve a copy of its petition on the parties named in the petition along with this form and the Statement of Position form. The petitioner files the petition with the NLRB, together with (1) a certificate showing service of these documents on the other parties named in the petition, and (2) a showing of interest to support the petition. The showing of interest is not served on the other parties.

Notice of Hearing – After a petition in a certification or decertification case is filed with the NLRB, the NLRB reviews the petition, certificate of service, and the required showing of interest for sufficiency, assigns the petition a case number, and promptly sends letters to the parties notifying them of the Board agent who will be handling the case. In most cases, the letters include a Notice of Representation Hearing. Except in cases presenting unusually complex issues, this pre-election hearing is set for a date 14 business days (excluding weekends and federal holidays) from the date of service of the notice of hearing. Once the hearing begins, it will continue day to day until completed absent extraordinary circumstances. The Notice of Representation Hearing also sets the due date for filing and serving the Statement(s) of Position and the Responsive Statement of Position(s). Included with the Notice of Representation Hearing are the following: (1) copy of the petition, (2) this form, (3) Statement of Position for non-petitioning parties, (4) petitioner's Responsive Statement of Position, (5) Notice of Petition for Election, and (6) letter advising how to contact the Board agent who will be handling the case and discussing those documents.

Hearing Postponement: Requests to postpone the hearing are not routinely granted, but the regional director may postpone the hearing for good cause. A party wishing to request a postponement should make the request in writing and set forth in detail the grounds for the request. The request should include the positions of the other parties regarding the postponement. The request must be filed electronically ("E-Filed") on the Agency's website (www.nlrb.gov) by following the instructions on the website. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Statement of Position Form and List(s) of Employees – The Statement of Position form solicits commerce and other information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. In an **RC** or **RD** case, as part of its Statement of Position form, the employer also provides a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. If the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional

form for the list is provided on the NLRB website at www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx

Ordinarily the Statement of Position must be filed with the Regional Office and served on the other parties such that it is received by them by noon 8 business days from the issuance of the Notice of Hearing. The regional director may postpone the due date for filing and serving the Statement of Position for good cause. The Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Statement of Position requirement are discussed on the following page under the heading "Preclusion." A request to postpone the hearing will not automatically be treated as a request for an extension of the Statement of Position due date. If a party wishes to request both a postponement of the hearing and a postponement of the Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Responsive Statement of Position – Petitioner's Responsive Statement(s) of Position solicits a response to the Statement(s) of Position filed by the other parties and further facilitates entry into election agreements or streamlines the preelection hearing. A petitioner must file a Responsive Statement of Position in response to each party's Statement of Position addressing each issue in each Statement of Position(s), if desired. In the case of an RM petition, the employer-petitioner must also provide commerce information and file and serve a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. Ordinarily, the Responsive Statement of Position must be electronically filed with the Regional Office and served on the other parties such that it is received by noon 3 business days prior to the hearing. The regional director may postpone the due date for filing and serving the Responsive Statement of Position for good cause. The Responsive Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Responsive Statement of Position requirement are discussed on the following page under the heading "Preclusion." A request to postpone the hearing will not automatically be treated as a request for an extension of the Responsive Statement of Position due date. If a party wishes to request both a postponement of the hearing and a Postponement of the Responsive Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Posting and Distribution of Notice of Petition for Election – Within 5 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and must also distribute it electronically to the employees in the petitioned-for unit if the employer customarily communicates with these employees electronically. The employer must maintain the posting until the petition is dismissed or withdrawn, or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election if proper and timely objections are filed.

Election Agreements – Elections can occur either by agreement of the parties or by direction of the regional director or the Board. Three types of agreements are available: (1) a Consent Election Agreement (Form NLRB-651); (2) a Stipulated Election Agreement (Form NLRB-652); and (3) a Full Consent Agreement (Form NLRB-5509). In the Consent Election Agreement and the Stipulated Election Agreement, the parties agree on an appropriate unit and the method, date, time, and place of a secret ballot election that will be conducted by an NLRB agent. In the Consent Agreement, the parties also agree that post-election matters (election objections or determinative challenged ballots) will be resolved with finality by the regional director; whereas in the Stipulated Election Agreement, the parties agree that they may request Board review of the regional director's post-election determinations. A Full Consent Agreement provides that the regional director will make final determinations regarding all pre-election and post-election issues.

Hearing Cancellation Based on Agreement of the Parties – The issuance of the Notice of Representation Hearing does not mean that the matter cannot be resolved by agreement of the parties. On the contrary, the NLRB encourages prompt voluntary adjustments and the Board agent assigned to the case will work with the parties to enter into an election agreement, so the parties can avoid the time and expense of participating in a hearing.

Hearing – A hearing will be held unless the parties enter into an election agreement approved by the regional director or the petition is dismissed or withdrawn.

***Purpose of Hearing*:** The primary purpose of a pre-election hearing is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit

appropriate for the purpose of collective bargaining or, in the case of a decertification petition, concerning a unit in which a labor organization has been certified or is being currently recognized by the employer as the bargaining representative.

***Issues at Hearing*:** Issues that might be litigated at the pre-election hearing include: jurisdiction; labor organization status; bars to elections; unit appropriateness; expanding and contracting unit issues; inclusion of professional employees with nonprofessional employees; seasonal operation; potential mixed guard/non-guard unit; and eligibility formulas. At the hearing, the timely filed Statement of Position and Responsive Statement of Position(s) will be received into evidence. The hearing officer will not receive evidence concerning any issue as to which the parties have not taken adverse positions, except for evidence regarding the Board's jurisdiction over the employer and evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.

***Preclusion*:** At the hearing, a party will be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or Responsive Statement of Position(s) or to place in dispute in timely response to another party's Statement of Position or response, except that no party will be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. As set forth in §102.66(d) of the Board's rules, if the employer fails to timely furnish the lists of employees, the employer will be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

***Conduct of Hearing*:** If held, the hearing is usually open to the public and will be conducted by a hearing officer of the NLRB. Any party has the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer also has the power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses will be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Parties appearing at any hearing who have or whose witnesses have disabilities falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, should notify the regional director as soon as possible and request the necessary assistance.

***Official Record*:** An official reporter will make the only official transcript of the proceedings and all citations in briefs or arguments must refer to the official record. (Copies of exhibits should be supplied to the hearing officer and other parties at the time the exhibit is offered in evidence.) All statements made at the hearing will be recorded by the official reporter while the hearing is on the record. If a party wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter. After the close of the hearing, any request for corrections to the record, either by stipulation or motion, should be forwarded to the regional director.

***Motions and Objections*:** All motions must be in writing unless stated orally on the record at the hearing and must briefly state the relief sought and the grounds for the motion. A copy of any motion must be served immediately on the other parties to the proceeding. Motions made during the hearing are filed with the hearing officer. All other motions are filed with the regional director, except that motions made after the transfer of the record to the Board are filed with the Board. If not E-Filed, an original and two copies of written motions shall be filed. Statements of reasons in support of motions or objections should be as concise as possible. Objections shall not be deemed waived by further participation in the hearing. On appropriate request, objections may be permitted to stand to an entire line of questioning. Automatic exceptions will be allowed to all adverse rulings.

***Election Details*:** Prior to the close of the hearing the hearing officer will: (1) solicit the parties' positions (but will not permit litigation) on the type, date(s), time(s), and location(s) of the election and the eligibility period; (2) solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election if an election is directed; (3) inform the parties that the regional director will issue a decision as soon as practicable and will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and (4) inform the parties of their obligations if the director directs an election and of the time for complying with those obligations.

***Oral Argument and Briefs*:** Upon request, any party is entitled to a reasonable period at the close of the hearing for oral argument, which will be included in the official transcript of the hearing. At any time before the close of the hearing, any party may file a memorandum addressing relevant issues or points of law. Post-hearing briefs shall be due within 5 business days of the close of the hearing. The hearing officer may allow up to 10 additional business days for such briefs prior to the close of hearing and for good cause. If filed, copies of the memorandum or brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the memorandum or brief. No reply brief may be filed except upon special leave of the regional director. Briefs including electronic documents, filed with the Regional Director must be formatted as double-spaced in an 8½ by 11 inch format and must be e-filed through the Board's website, www.nlrb.gov.

Regional Director Decision - After the hearing, the regional director issues a decision directing an election, dismissing the petition or reopening the hearing. A request for review of the regional director's pre-election decision may be filed with the Board at any time after issuance of the decision until 10 business days after a final disposition of the proceeding by the regional director. Accordingly, a party need not file a request for review before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal. The Board will grant a request for review only where compelling reasons exist therefor.

Voter List – The employer must provide to the regional director and the parties named in the election agreement or direction of election a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular (''cell'') telephone numbers) of all eligible voters. (In construction industry elections, unless the parties stipulate to the contrary, also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.) The employer must also include in a separate section of the voter list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge. The list of names must be alphabetized (overall or by department) and be in the same Microsoft Word file (or Microsoft Word compatible file) format as the initial lists provided with the Statement of Position form unless the parties agree to a different format or the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list must be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction. To be timely filed and served, the voter list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction of elections unless a longer time is specified in the agreement or direction. A certificate of service on all parties must be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

Waiver of Time to Use Voter List – Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 calendar days after the date when the employer must file the voter list with the Regional Office. However, the parties entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483. A waiver will not be effective unless all parties who are entitled to the list agree to waive the same number of days.

Election – Information about the election, requirements to post and distribute the Notice of Election, and possible proceedings after the election is available from the Regional Office and will be provided to the parties when the Notice of Election is sent to the parties.

Withdrawal or Dismissal – If it is determined that the NLRB does not have jurisdiction or that other criteria for proceeding to an election are not met, the petitioner is offered an opportunity to withdraw the petition. If the petitioner does not withdraw the petition, the regional director will dismiss the petition and advise the petitioner of the reason for the dismissal and of the right to appeal to the Board.

REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A STATEMENT OF POSITION FORM

Completing and Filing this Form: The Notice of Hearing indicates which parties are responsible for completing the form. If you are required to complete the form, you must have it signed by an authorized representative and file a completed copy (including all attachments) with the RD and serve copies on all parties named in the petition by the date and time established for its submission. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You must EFile your Statement of Position at www.nlrb.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed.**

> **Note:** ***Non-employer parties who complete this Statement of Position are NOT required to complete items 8f and 8g of the form, or to provide a commerce questionnaire or the lists described in item 7.***

Required Lists: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at **www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx**.

Consequences of Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

> A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

FORM NLRB-505
(12-20)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE	
Case No.	Date Filed
08-RC-284759	October 18, 2021

INSTRUCTIONS: *Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.*
Note: *Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7.*

1a. Full name of party filing Statement of Position	1c. Business Phone:	1e. Fax No.:
1b. Address *(Street and number, city, state, and ZIP code)*	1d. Cell No.:	1f. e-Mail Address

2. Do you agree that the NLRB has jurisdiction over the Employer in this case? [ ] Yes [ ] No
(A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)

3. Do you agree that the proposed unit is appropriate? [ ] Yes [ ] No *(If not, answer 3a and 3b)*

a. State the basis for your contention that the proposed unit is not appropriate. (*If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards)*

b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.

Added	Excluded

4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.

5. Is there a bar to conducting an elec ion in this case? [ ] Yes [ ] No *If yes, state the basis for your position.*

6. Describe all other issues you intend to raise at the pre-election hearing.

7. The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at **www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx**.
(a) A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B)
(b) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be *added* to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be *excluded* from the proposed unit to make it an appropriate unit. (Attachment D)

8a. State your position with respect to the details of any election that may be conducted in this matter. Type: [ ] Manual [ ] Mail [ ] Mixed Manual/Mail

8b. Date(s)	8c. Time(s)	8d. Location(s)
8e. Eligibility Period (e.g. special eligibility formula)	8f. Last Payroll Period Ending Date	8g. Length of payroll period [ ] Weekly [ ]Biweekly [ ] Other *(specify length)*

9. Representative who will accept service of all papers for purposes of the representation proceeding

9a. Full name and title of authorized representative	9b. Signature of authorized representative	9c. Date
9d. Address *(Street and number, city, state, and ZIP code)*		9e. e-Mail Address
9f. Business Phone No.:	9g. Fax No.	9h. Cell No.

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U S C Section 151 et seq The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings The routine uses for the information are fully set forth in the Federal Register, 71 Fed 74942-43 (December 13, 2006) The NLRB will further explain these uses upon request Failure to supply the information requested by this form may preclude you from litigating issues under 102 66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court

FORM NLRB-5081
(3-11)

NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME	CASE NUMBER
	08-RC-284759

1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)

2. TYPE OF ENTITY

[ ] CORPORATION [ ] LLC [ ] LLP [ ] PARTNERSHIP [ ] SOLE PROPRIETORSHIP [ ] OTHER (Specify)

3. IF A CORPORATION or LLC

A. STATE OF INCORPORATION OR FORMATION	B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS

5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR

6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS *(Products handled or manufactured, or nature of services performed).*

7A. PRINCIPAL LOCATION:	7B. BRANCH LOCATIONS:

8. NUMBER OF PEOPLE PRESENTLY EMPLOYED

A. TOTAL:	B. AT THE ADDRESS INVOLVED IN THIS MATTER:

9. DURING THE MOST RECENT *(Check the appropriate box):* [ ] **CALENDAR** [ ] **12 MONTHS** or [ ] **FISCAL YEAR** *(FY DATES _____)*

	YES	NO
A. Did you **provide services** valued in excess of $50,000 directly to customers outside your State? If no, indicate actual value. $_____		
B. If you answered no to 9A, did you **provide services** valued in excess of $50,000 to customers in your State who purchased goods valued in excess of $50,000 from directly outside your State? If no, indicate the value of any such services you provided. $_____		
C. If you answered no to 9A and 9B, did you **provide services** valued in excess of $50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than $50,000, indicate amount. $_____		
D. Did you **sell goods** valued in excess of $50,000 directly to customers located outside your State? If less than $50,000, indicate amount. $_____		
E. If you answered no to 9D, did you **sell goods** valued in excess of $50,000 directly to customers located inside your State who purchased other goods valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $_____		
F. Did you **purchase and receive goods** valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $_____		
G. Did you **purchase and receive goods** valued in excess of $50,000 from enterprises who received the goods directly from points outside your State? If less than $50,000, indicate amount. $_____		
H. **Gross Revenues** from all sales or performance of services *(Check the largest amount):* [ ] $100,000 [ ] $250,000 [ ] $500,000 [ ] $1,000,000 or more If less than $100,000, indicate amount.		
I. **Did you begin operations within the last 12 months?** If yes, specify date: _____		

10. ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?

[ ] YES [ ] NO *(If yes, name and address of association or group).*

11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS

NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE *(Type or Print)*	SIGNATURE	E-MAIL ADDRESS	DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A RESPONSIVE STATEMENT OF POSITION FORM

Completing and Filing this Form: For **RC and RD petitions**, the Petitioner is required to complete this form in response to each timely filed and served Statement of Position filed by another party. For **RM petitions**, the Employer-Petitioner must complete a Responsive Statement of Position form and submit the list described below. In accordance with Section 102.63(b) of the Board's Rules, if you are required to complete the form, you must have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition responding to the issues raised in another party's Statement of Position, such that it is received no later than noon three business days before the date of the hearing. A separate form must be completed for each timely filed and properly served Statement of Position you receive. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You must E-File your Responsive Statement of Position at www.NLRB.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed. Note that if you are completing this form as a PDF downloaded from www.NLRB.gov, the form will lock upon signature and no further editing may be made.**

Required List: In addition to responding to the issues raised in another party's Statement of Position, if any, the Employer-Petitioner in an RM case is required to file and serve on the parties a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. This list must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the list in the required form, the list must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx

Consequences of Failure to Submit a Responsive Statement of Position: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

> A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

FORM NLRB-506
(12-20)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

RESPONSIVE STATEMENT OF POSITION – RC, RD or RM PETITION

DO NOT WRITE IN THIS SPACE	
Case No.	Date Filed
08-RC-284759	October 18, 2021

INSTRUCTIONS: *If a party has submitted and served on you a timely Statement of Position to an RC, RD or RM petition, the Petitioner must submit this Responsive Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and any attachments on each party named in the petition in this case such that it is received by noon local time, three business days prior to the hearing date specified in the Notice of Hearing. A separate form must be completed for each timely filed and properly served Statement of Position received by the Petitioner. The Petitioner-Employer in a RM case is required to file this Responsive Statement of Position and include an appropriate employee list without regard to whether another party has filed a Statement of Position.*

This Responsive Statement of Position is filed by the Petitioner in response to a Statement of Position received from the following party:

The Employer	**An Intervenor/Union**

1a. Full Name of Party Filing Responsive Statement of Position

1c. Business Phone	1d. Cell No.	1e. Fax No.	1f. E-Mail Address

1b. Address (Street and Number, City, State, and ZIP Code)

2. Identify all issues raised in the other party's Statement of Position that you dispute and describe the basis of your dispute:

a. EMPLOYER NAME/IDENTITY [Box 1a of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

b. JURISDICTION [Box 2 of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

c. APPROPRIATENESS OF UNIT [Boxes 3, 3a and 3b of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

d. INDIVIDUAL ELIGIBILITY [Box 4 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

e. BARS TO ELECTION [Box 5 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

f. ALL OTHER ISSUES [Box 6 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

g. ELECTION DETAILS [Boxes 8a, 8b, 8c, 8d, 8e, 8f, and 8g of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

Full Name and Title of Authorized Representative	Signature of Authorized Representative	Date

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001) PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

Please fill all necessary fields on the form PRIOR to digitally signing. To make changes after the form has been signed, right-click on the signature field and click "clear signature." Once complete, please sign the form.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 8
1240 E 9TH ST
STE 1695
CLEVELAND, OH 44199-2086

Agency Website: www.nlrb.gov
Telephone: (216)522-3715
Fax: (216)522-2418

Download
NLRB
Mobile App

October 20, 2021

URGENT

decatur@kenyon.edu
Sean Decatur, President
Kenyon College
Ransom Hall
Gambier, OH 43022

Re: Kenyon College
Case 08-RC-284759

Dear Mr. Decatur:

Enclosed is a copy of a petition that United Electrical, Radio and Machine Workers of America (UE) filed with the National Labor Relations Board (NLRB) seeking to represent certain of your employees. After a petition is filed, the employer is required to promptly take certain actions so please read this letter carefully to make sure you are aware of the employer's obligations. This letter tells you how to contact the Board agent who will be handling this matter, about the requirement to post and distribute the Notice of Petition for Election, the requirement to complete and serve a Statement of Position Form, the Petitioner's requirement to complete and serve a Responsive Statement of Position Form, a scheduled hearing in this matter, other information needed including a voter list, your right to be represented, and NLRB procedures, including how to submit documents to the NLRB.

Investigator: This petition will be investigated by Field Examiner Dreyon O. Wynn whose telephone number is (216)303-7386. The Board agent will contact you shortly to discuss processing the petition. If you have any questions, please do not hesitate to call the Board agent. If the agent is not available, you may contact Assistant to the Regional Director NORA F. MCGINLEY whose telephone number is (216)303-7370. The Board agent may also contact you and the other party or parties to schedule a conference meeting or telephonic or video conference for some time before the close of business the day following receipt of the final Responsive Statement(s) of Position. This will give the parties sufficient time to determine if any issues can be resolved prior to hearing or if a hearing is necessary. If appropriate, the NLRB attempts to schedule an election either by agreement of the parties or by holding a hearing and then directing an election.

Required Posting and Distribution of Notice: You must post the enclosed Notice of Petition for Election by **Wednesday, October 27, 2021,** in conspicuous places, including all places where notices to employees are customarily posted. The Notice of Petition for Election must be posted so all pages are simultaneously visible. If you customarily communicate electronically with employees in the petitioned-for unit, you must also distribute the notice

electronically to them. You must maintain the posting until the petition is dismissed or withdrawn or this notice is replaced by the Notice of Election. Posting and distribution of the Notice of Petition for Election will inform the employees whose representation is at issue and the employer of their rights and obligations under the National Labor Relations Act in the representation context. Failure to post or distribute the notice may be grounds for setting aside an election if proper and timely objections are filed.

Required Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, the employer is required to complete the enclosed Statement of Position form (including the attached Commerce Questionnaire), have it signed by an authorized representative, **Monday, November 1, 2021,** and file a completed copy (with all required attachments) with this office and serve it on all parties named in the petition such that it is received by them by **noon Eastern Time** on This form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. **This form must be e-Filed, but unlike other e-Filed documents, will *not* be timely if filed on the due date but after noon Eastern Time.** If you have questions about this form or would like assistance in filling out this form, please contact the Board agent named above.

List(s) of Employees: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx

Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under Section 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

> A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction

> to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Responsive Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, following timely filing and service of an employer's Statement of Position, the petitioner is required to complete the enclosed Responsive Statement of Position form, have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition responding to the issues raised in the employer's Statement of Position, such that it is received no later than **noon Eastern Time** on **Thursday, November 4, 2021.**

Notice of Hearing: Enclosed is a Notice of Representation Hearing to be conducted at **10:00 AM** on **Tuesday, November 9, 2021** via videoconference, if the parties do not voluntarily agree to an election. If a hearing is necessary, the hearing will run on consecutive days until concluded unless the regional director concludes that extraordinary circumstances warrant otherwise. Before the hearing begins, we will continue to explore potential areas of agreement with the parties in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Upon request of a party showing good cause, the regional director may postpone the hearing. A party desiring a postponement should make the request to the regional director in writing, set forth in detail the grounds for the request, and include the positions of the other parties regarding the postponement. E-Filing the request is required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Other Information Needed Now: Please submit to this office, as soon as possible, the following information needed to handle this matter:

(a) A copy of any existing or recently expired collective-bargaining agreements, and any amendments or extensions, or any recognition agreements covering any of your employees in the unit involved in the petition (the petitioned-for unit);

(b) The name and contact information for any other labor organization (union) claiming to represent any of the employees in the petitioned-for unit;

(c) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any.

(d) If you desire a formal check of the showing of interest, you must provide an alphabetized payroll list of employees in the petitioned-for unit, with their job classifications, for the payroll period immediately before the date of this petition. Such a payroll list should be submitted as early as possible prior to the hearing. Ordinarily a formal check of the showing of interest is not performed using the employee list submitted as part of the Statement of Position.

Voter List: If an election is held in this matter, the employer must transmit to this office and to the other parties to the election, an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of eligible voters. Usually, the list must be furnished within 2 business days of the issuance of the Decision and Direction of Election or approval of an election agreement. I am advising you of this requirement now, so that you will have ample time to prepare this list. The list must be electronically filed with the Region and served electronically on the other parties. To guard against potential abuse, this list may not be used for purposes other than the representation proceeding, NLRB proceedings arising from it or other related matters.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlrb.gov, or at the Regional office upon your request.

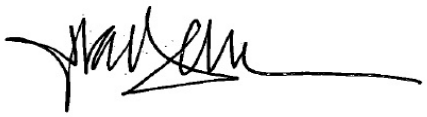
If someone contacts you about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the NLRB. Their knowledge regarding this matter was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Procedures: Pursuant to Section 102.5 of the Board's Rules and Regulations, parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and/or other evidence, by electronically submitting (E-Filing) them through the Agency's web site (www.nlrb.gov). You must e-file all documents electronically or provide a written statement explaining why electronic submission is not possible or feasible. Failure to comply with Section 102.5 will result in rejection of your submission. The Region will make its determinations solely based on the documents and evidence properly submitted. All evidence submitted electronically should be in the form in which it is normally used and maintained in the course of business (i.e., native format). Where evidence submitted electronically is not in native format, it should be submitted in a manner that retains the essential functionality of the native

format (i.e., in a machine-readable and searchable electronic format). If you have questions about the submission of evidence or expect to deliver a large quantity of electronic records, please promptly contact the Board agent investigating the petition.

Information about the NLRB and our customer service standards is available on our website, www.nlrb.gov, or from an NLRB office upon your request. We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,



IVA Y. CHOE
Regional Director

Enclosures

1. Petition
2. Notice of Petition for Election (Form 5492)
3. Notice of Representation Hearing
4. Description of Procedures in Certification and Decertification Cases (Form 4812)
5. Statement of Position form and Commerce Questionnaire (Form 505)
6. Responsive Statement of Position (Form 506)

Form NLRB-5492
(Rev: 12-2015)

National Labor Relations Board

NOTICE OF PETITION FOR ELECTION

This notice is to inform employees that United Electrical, Radio and Machine Workers of America (UE) has filed a petition with the National Labor Relations Board (NLRB), a Federal agency, in Case 08-RC-284759 seeking an election to become certified as the representative of the employees of Kenyon College in the unit set forth below:

All hourly paid student employees of Kenyon College but excluding all managerial employees, guards, professional employees and supervisors as defined by the Act, and all other employees.

This notice also provides you with information about your basic rights under the National Labor Relations Act, the processing of the petition, and rules to keep NLRB elections fair and honest.

YOU HAVE THE RIGHT under Federal Law

- **To self-organization**
- **To form, join, or assist labor organizations**
- **To bargain collectively through representatives of your own choosing**
- **To act together for the purposes of collective bargaining or other mutual aid or protection**
- **To refuse to do any or all of these things unless the union and employer, in a state where such agreements are permitted, enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustments).**

PROCESSING THIS PETITION

Elections do not necessarily occur in all cases after a petition is filed. NO FINAL DECISIONS HAVE BEEN MADE YET regarding the appropriateness of the proposed unit or whether an election will be held in this matter. If appropriate, the NLRB will first see if the parties will enter into an election agreement that specifies the method, date, time, and location of an election and the unit of employees eligible to vote. If the parties do not enter into an election agreement, usually a hearing is held to receive evidence on the appropriateness of the unit and other issues in dispute. After a hearing, an election may be directed by the NLRB, if appropriate.

IF AN ELECTION IS HELD, it will be conducted by the NLRB by secret ballot and Notices of Election will be posted before the election giving complete details for voting.

ELECTION RULES

The NLRB applies rules that are intended to keep its elections fair and honest and that result in a free choice. If agents of any party act in such a way as to interfere with your right to a free election, the election can be set aside by the NLRB. Where appropriate the NLRB provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with employees' rights and may result in setting aside the election:

- **Threatening loss of jobs or benefits by an employer or a union**
- **Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises**
- **An employer firing employees to discourage or encourage union activity or a union causing them to be fired to encourage union activity**
- **Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or, if the election is conducted by mail, from the time and date the ballots are scheduled to be sent out by the Region until the time and date set for their return**
- **Incitement by either an employer or a union of racial or religious prejudice by inflammatory appeals**
- **Threatening physical force or violence to employees by a union or an employer to influence their votes**

Please be assured that IF AN ELECTION IS HELD, every effort will be made to protect your right to a free choice under the law. Improper conduct will not be permitted. All parties are expected to cooperate fully with the NLRB in maintaining basic principles of a fair election as required by law. The NLRB as an agency of the United States Government does not endorse any choice in the election.

For additional information about the processing of petitions, go to www.nlrb.gov or contact the NLRB at (216)522-3715.

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED BY ANYONE. IT MUST REMAIN POSTED WITH ALL PAGES SIMULTANEOUSLY VISIBLE UNTIL REPLACED BY THE NOTICE OF ELECTION OR THE PETITION IS DISMISSED OR WITHDRAWN.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

Kenyon College **Employer** **and** **United Electrical, Radio and Machine Workers of America (UE)** **Petitioner**	**Case 08-RC-284759**

NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, a hearing will be conducted before a hearing officer of the National Labor Relations Board at 10:00 AM on **Tuesday, November 9, 2021** and on consecutive days thereafter until concluded, via ZOOM videoconference. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, Kenyon College must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Eastern time on **Monday, November 1, 2021.** Following timely filing and service of a Statement of Position by Kenyon College, the Petitioner must complete its Responsive Statement of Position(s) responding to the issues raised in the Employer's and/or Union's Statement of Position and file them and all attachments with the Regional Director and serve them on the parties named in the petition such that they are received by them no later than **noon** Eastern on **Thursday, November 4, 2021**.

Pursuant to Section 102.5 of the Board's Rules and Regulations, all documents filed in cases before the Agency must be filed by electronically submitting (E-Filing) through the Agency's website (www.nlrb.gov), unless the party filing the document does not have access to the means for filing electronically or filing electronically would impose an undue burden. Documents filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Detailed instructions for using the NLRB's E-Filing system can be found in the E-Filing System User Guide

The Statement of Position and Responsive Statement of Position must be E-Filed but, unlike other E-Filed documents, must be filed by **noon** Eastern on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position and Responsive Statement of Position are not required to be filed. If an election agreement is signed by all parties and returned to the Regional office after the due date of the Statement of Position but before the due date of the Responsive Statement of Position, the Responsive Statement of Position is not required to be filed.

Dated: October 20, 2021

IVA Y. CHOE
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 08
1240 E 9TH ST
STE 1695
CLEVELAND, OH 44199-2086

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Kenyon College **Employer** **and** **United Electrical, Radio and Machine Workers of America (UE)** **Petitioner**	**Case 08-RC-284759**

AFFIDAVIT OF SERVICE OF: Petition dated October 18, 2021**, Notice of Representation Hearing dated** October 20, 2021**, Description of Procedures in Certification and Decertification Cases (Form NLRB-4812), Notice of Petition for Election, and Statement of Position Form (Form NLRB-505).**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on October 20, 2021, I served the above documents by electronic mail and regular mail upon the following persons, addressed to them at the following addresses:

Sean Decatur, President
Kenyon College
Ransom Hall
Gambier, OH 43022
decatur@kenyon.edu

Mark Meinster, International Representative
United Electrical, Radio and Machine
Workers of America (UE)
37 S. Ashland Ave
Chicago, IL 60607
mark.meinster@ueunion.org
Fax: (312)829-8307

October 20, 2021
Date

SHARON ZILINSKAS, Designated Agent of NLRB
Name

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DESCRIPTION OF REPRESENTATION CASE PROCEDURES IN CERTIFICATION AND DECERTIFICATION CASES

The National Labor Relations Act grants employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity. A party may file an RC, RD or RM petition with the National Labor Relations Board (NLRB) to conduct a secret ballot election to determine whether a representative will represent, or continue to represent, a unit of employees. An **RC** petition is generally filed by a union that desires to be certified as the bargaining representative. An **RD** petition is filed by employees who seek to remove the currently recognized union as the bargaining representative. An **RM** petition is filed by an employer who seeks an election because one or more individuals or unions have sought recognition as the bargaining representative, or based on a reasonable belief supported by objective considerations that the currently recognized union has lost its majority status. This form generally describes representation case procedures in RC, RD and RM cases, also referred to as certification and decertification cases.

Right to be Represented – Any party to a case with the NLRB has the right to be represented by an attorney or other representative in any proceeding before the NLRB. A party wishing to have a representative appear on its behalf should have the representative complete a Notice of Appearance (Form NLRB-4701), and E-File it at www.nlrb.gov or forward it to the NLRB Regional Office handling the petition as soon as possible.

Filing and Service of Petition – A party filing an RC, RD or RM petition is required to serve a copy of its petition on the parties named in the petition along with this form and the Statement of Position form. The petitioner files the petition with the NLRB, together with (1) a certificate showing service of these documents on the other parties named in the petition, and (2) a showing of interest to support the petition. The showing of interest is not served on the other parties.

Notice of Hearing – After a petition in a certification or decertification case is filed with the NLRB, the NLRB reviews the petition, certificate of service, and the required showing of interest for sufficiency, assigns the petition a case number, and promptly sends letters to the parties notifying them of the Board agent who will be handling the case. In most cases, the letters include a Notice of Representation Hearing. Except in cases presenting unusually complex issues, this pre-election hearing is set for a date 14 business days (excluding weekends and federal holidays) from the date of service of the notice of hearing. Once the hearing begins, it will continue day to day until completed absent extraordinary circumstances. The Notice of Representation Hearing also sets the due date for filing and serving the Statement(s) of Position and the Responsive Statement of Position(s). Included with the Notice of Representation Hearing are the following: (1) copy of the petition, (2) this form, (3) Statement of Position for non-petitioning parties, (4) petitioner's Responsive Statement of Position, (5) Notice of Petition for Election, and (6) letter advising how to contact the Board agent who will be handling the case and discussing those documents.

Hearing Postponement: Requests to postpone the hearing are not routinely granted, but the regional director may postpone the hearing for good cause. A party wishing to request a postponement should make the request in writing and set forth in detail the grounds for the request. The request should include the positions of the other parties regarding the postponement. The request must be filed electronically ("E-Filed") on the Agency's website (www.nlrb.gov) by following the instructions on the website. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Statement of Position Form and List(s) of Employees – The Statement of Position form solicits commerce and other information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. In an **RC** or **RD** case, as part of its Statement of Position form, the employer also provides a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. If the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional

form for the list is provided on the NLRB website at www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx

Ordinarily the Statement of Position must be filed with the Regional Office and served on the other parties such that it is received by them by noon 8 business days from the issuance of the Notice of Hearing. The regional director may postpone the due date for filing and serving the Statement of Position for good cause. The Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Statement of Position requirement are discussed on the following page under the heading "Preclusion." A request to postpone the hearing will not automatically be treated as a request for an extension of the Statement of Position due date. If a party wishes to request both a postponement of the hearing and a postponement of the Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Responsive Statement of Position – Petitioner's Responsive Statement(s) of Position solicits a response to the Statement(s) of Position filed by the other parties and further facilitates entry into election agreements or streamlines the preelection hearing. A petitioner must file a Responsive Statement of Position in response to each party's Statement of Position addressing each issue in each Statement of Position(s), if desired. In the case of an RM petition, the employer-petitioner must also provide commerce information and file and serve a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. Ordinarily, the Responsive Statement of Position must be electronically filed with the Regional Office and served on the other parties such that it is received by noon 3 business days prior to the hearing. The regional director may postpone the due date for filing and serving the Responsive Statement of Position for good cause. The Responsive Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Responsive Statement of Position requirement are discussed on the following page under the heading "Preclusion." A request to postpone the hearing will not automatically be treated as a request for an extension of the Responsive Statement of Position due date. If a party wishes to request both a postponement of the hearing and a Postponement of the Responsive Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Posting and Distribution of Notice of Petition for Election – Within 5 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and must also distribute it electronically to the employees in the petitioned-for unit if the employer customarily communicates with these employees electronically. The employer must maintain the posting until the petition is dismissed or withdrawn, or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election if proper and timely objections are filed.

Election Agreements – Elections can occur either by agreement of the parties or by direction of the regional director or the Board. Three types of agreements are available: (1) a Consent Election Agreement (Form NLRB-651); (2) a Stipulated Election Agreement (Form NLRB-652); and (3) a Full Consent Agreement (Form NLRB-5509). In the Consent Election Agreement and the Stipulated Election Agreement, the parties agree on an appropriate unit and the method, date, time, and place of a secret ballot election that will be conducted by an NLRB agent. In the Consent Agreement, the parties also agree that post-election matters (election objections or determinative challenged ballots) will be resolved with finality by the regional director; whereas in the Stipulated Election Agreement, the parties agree that they may request Board review of the regional director's post-election determinations. A Full Consent Agreement provides that the regional director will make final determinations regarding all pre-election and post-election issues.

Hearing Cancellation Based on Agreement of the Parties – The issuance of the Notice of Representation Hearing does not mean that the matter cannot be resolved by agreement of the parties. On the contrary, the NLRB encourages prompt voluntary adjustments and the Board agent assigned to the case will work with the parties to enter into an election agreement, so the parties can avoid the time and expense of participating in a hearing.

Hearing – A hearing will be held unless the parties enter into an election agreement approved by the regional director or the petition is dismissed or withdrawn.

***Purpose of Hearing*:** The primary purpose of a pre-election hearing is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit

appropriate for the purpose of collective bargaining or, in the case of a decertification petition, concerning a unit in which a labor organization has been certified or is being currently recognized by the employer as the bargaining representative.

***Issues at Hearing*:** Issues that might be litigated at the pre-election hearing include: jurisdiction; labor organization status; bars to elections; unit appropriateness; expanding and contracting unit issues; inclusion of professional employees with nonprofessional employees; seasonal operation; potential mixed guard/non-guard unit; and eligibility formulas. At the hearing, the timely filed Statement of Position and Responsive Statement of Position(s) will be received into evidence. The hearing officer will not receive evidence concerning any issue as to which the parties have not taken adverse positions, except for evidence regarding the Board's jurisdiction over the employer and evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.

***Preclusion*:** At the hearing, a party will be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or Responsive Statement of Position(s) or to place in dispute in timely response to another party's Statement of Position or response, except that no party will be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. As set forth in §102.66(d) of the Board's rules, if the employer fails to timely furnish the lists of employees, the employer will be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

***Conduct of Hearing*:** If held, the hearing is usually open to the public and will be conducted by a hearing officer of the NLRB. Any party has the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer also has the power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses will be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Parties appearing at any hearing who have or whose witnesses have disabilities falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, should notify the regional director as soon as possible and request the necessary assistance.

***Official Record*:** An official reporter will make the only official transcript of the proceedings and all citations in briefs or arguments must refer to the official record. (Copies of exhibits should be supplied to the hearing officer and other parties at the time the exhibit is offered in evidence.) All statements made at the hearing will be recorded by the official reporter while the hearing is on the record. If a party wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter. After the close of the hearing, any request for corrections to the record, either by stipulation or motion, should be forwarded to the regional director.

***Motions and Objections*:** All motions must be in writing unless stated orally on the record at the hearing and must briefly state the relief sought and the grounds for the motion. A copy of any motion must be served immediately on the other parties to the proceeding. Motions made during the hearing are filed with the hearing officer. All other motions are filed with the regional director, except that motions made after the transfer of the record to the Board are filed with the Board. If not E-Filed, an original and two copies of written motions shall be filed. Statements of reasons in support of motions or objections should be as concise as possible. Objections shall not be deemed waived by further participation in the hearing. On appropriate request, objections may be permitted to stand to an entire line of questioning. Automatic exceptions will be allowed to all adverse rulings.

***Election Details*:** Prior to the close of the hearing the hearing officer will: (1) solicit the parties' positions (but will not permit litigation) on the type, date(s), time(s), and location(s) of the election and the eligibility period; (2) solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election if an election is directed; (3) inform the parties that the regional director will issue a decision as soon as practicable and will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and (4) inform the parties of their obligations if the director directs an election and of the time for complying with those obligations.

***Oral Argument and Briefs*:** Upon request, any party is entitled to a reasonable period at the close of the hearing for oral argument, which will be included in the official transcript of the hearing. At any time before the close of the hearing, any party may file a memorandum addressing relevant issues or points of law. Post-hearing briefs shall be due within 5 business days of the close of the hearing. The hearing officer may allow up to 10 additional business days for such briefs prior to the close of hearing and for good cause. If filed, copies of the memorandum or brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the memorandum or brief. No reply brief may be filed except upon special leave of the regional director. Briefs including electronic documents, filed with the Regional Director must be formatted as double-spaced in an 8½ by 11 inch format and must be e-filed through the Board's website, www.nlrb.gov.

Regional Director Decision - After the hearing, the regional director issues a decision directing an election, dismissing the petition or reopening the hearing. A request for review of the regional director's pre-election decision may be filed with the Board at any time after issuance of the decision until 10 business days after a final disposition of the proceeding by the regional director. Accordingly, a party need not file a request for review before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal. The Board will grant a request for review only where compelling reasons exist therefor.

Voter List – The employer must provide to the regional director and the parties named in the election agreement or direction of election a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular (''cell'') telephone numbers) of all eligible voters. (In construction industry elections, unless the parties stipulate to the contrary, also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.) The employer must also include in a separate section of the voter list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge. The list of names must be alphabetized (overall or by department) and be in the same Microsoft Word file (or Microsoft Word compatible file) format as the initial lists provided with the Statement of Position form unless the parties agree to a different format or the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list must be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction. To be timely filed and served, the voter list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction of elections unless a longer time is specified in the agreement or direction. A certificate of service on all parties must be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

Waiver of Time to Use Voter List – Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 calendar days after the date when the employer must file the voter list with the Regional Office. However, the parties entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483. A waiver will not be effective unless all parties who are entitled to the list agree to waive the same number of days.

Election – Information about the election, requirements to post and distribute the Notice of Election, and possible proceedings after the election is available from the Regional Office and will be provided to the parties when the Notice of Election is sent to the parties.

Withdrawal or Dismissal – If it is determined that the NLRB does not have jurisdiction or that other criteria for proceeding to an election are not met, the petitioner is offered an opportunity to withdraw the petition. If the petitioner does not withdraw the petition, the regional director will dismiss the petition and advise the petitioner of the reason for the dismissal and of the right to appeal to the Board.

REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A STATEMENT OF POSITION FORM

Completing and Filing this Form: The Notice of Hearing indicates which parties are responsible for completing the form. If you are required to complete the form, you must have it signed by an authorized representative and file a completed copy (including all attachments) with the RD and serve copies on all parties named in the petition by the date and time established for its submission. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You must EFile your Statement of Position at www.nlrb.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed.**

> **Note:** ***Non-employer parties who complete this Statement of Position are NOT required to complete items 8f and 8g of the form, or to provide a commerce questionnaire or the lists described in item 7.***

Required Lists: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at **www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx**.

Consequences of Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

> A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

FORM NLRB-505
(12-20)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE	
Case No.	Date Filed
08-RC-284759	October 18, 2021

INSTRUCTIONS: *Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.*
Note: *Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7.*

1a. Full name of party filing Statement of Position	1c. Business Phone:	1e. Fax No.:
1b. Address *(Street and number, city, state, and ZIP code)*	1d. Cell No.:	1f. e-Mail Address

2. Do you agree that the NLRB has jurisdiction over the Employer in this case? [ ] Yes [ ] No
(A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)

3. Do you agree that the proposed unit is appropriate? [ ] Yes [ ] No *(If not, answer 3a and 3b)*

a. State the basis for your contention that the proposed unit is not appropriate. (*If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards)*

b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.

Added	Excluded

4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.

5. Is there a bar to conducting an elec ion in this case? [ ] Yes [ ] No *If yes, state the basis for your position.*

6. Describe all other issues you intend to raise at the pre-election hearing.

7. The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at **www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx**.
(a) A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B)
(b) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be *added* to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be *excluded* from the proposed unit to make it an appropriate unit. (Attachment D)

8a. State your position with respect to the details of any election that may be conducted in this matter. Type: [ ] Manual [ ] Mail [ ] Mixed Manual/Mail

8b. Date(s)	8c. Time(s)	8d. Location(s)
8e. Eligibility Period (e.g. special eligibility formula)	8f. Last Payroll Period Ending Date	8g. Length of payroll period [ ] Weekly [ ]Biweekly [ ] Other *(specify length)*

9. Representative who will accept service of all papers for purposes of the representation proceeding

9a. Full name and title of authorized representative	9b. Signature of authorized representative	9c. Date
9d. Address *(Street and number, city, state, and ZIP code)*		9e. e-Mail Address
9f. Business Phone No.:	9g. Fax No.	9h. Cell No.

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U S C Section 151 et seq The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings The routine uses for the information are fully set forth in the Federal Register, 71 Fed 74942-43 (December 13, 2006) The NLRB will further explain these uses upon request Failure to supply the information requested by this form may preclude you from litigating issues under 102 66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court

FORM NLRB-5081
(3-11)

NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME	CASE NUMBER
	08-RC-284759

1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)

2. TYPE OF ENTITY

[ ] CORPORATION [ ] LLC [ ] LLP [ ] PARTNERSHIP [ ] SOLE PROPRIETORSHIP [ ] OTHER (Specify)

3. IF A CORPORATION or LLC

A. STATE OF INCORPORATION OR FORMATION	B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS

5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR

6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS *(Products handled or manufactured, or nature of services performed).*

7A. PRINCIPAL LOCATION:	7B. BRANCH LOCATIONS:

8. NUMBER OF PEOPLE PRESENTLY EMPLOYED

A. TOTAL:	B. AT THE ADDRESS INVOLVED IN THIS MATTER:

9. DURING THE MOST RECENT *(Check the appropriate box):* [ ] **CALENDAR** [ ] **12 MONTHS** or [ ] **FISCAL YEAR** *(FY DATES _____)*

	YES	NO
A. Did you **provide services** valued in excess of $50,000 directly to customers outside your State? If no, indicate actual value. $_____		
B. If you answered no to 9A, did you **provide services** valued in excess of $50,000 to customers in your State who purchased goods valued in excess of $50,000 from directly outside your State? If no, indicate the value of any such services you provided. $_____		
C. If you answered no to 9A and 9B, did you **provide services** valued in excess of $50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than $50,000, indicate amount. $_____		
D. Did you **sell goods** valued in excess of $50,000 directly to customers located outside your State? If less than $50,000, indicate amount. $_____		
E. If you answered no to 9D, did you **sell goods** valued in excess of $50,000 directly to customers located inside your State who purchased other goods valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $_____		
F. Did you **purchase and receive goods** valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $_____		
G. Did you **purchase and receive goods** valued in excess of $50,000 from enterprises who received the goods directly from points outside your State? If less than $50,000, indicate amount. $_____		
H. **Gross Revenues** from all sales or performance of services *(Check the largest amount):* [ ] $100,000 [ ] $250,000 [ ] $500,000 [ ] $1,000,000 or more If less than $100,000, indicate amount.		
I. **Did you begin operations within the last 12 months?** If yes, specify date: _____		

10. ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?

[ ] YES [ ] NO *(If yes, name and address of association or group).*

11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS

NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE *(Type or Print)*	SIGNATURE	E-MAIL ADDRESS	DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A RESPONSIVE STATEMENT OF POSITION FORM

Completing and Filing this Form: For **RC and RD petitions**, the Petitioner is required to complete this form in response to each timely filed and served Statement of Position filed by another party. For **RM petitions**, the Employer-Petitioner must complete a Responsive Statement of Position form and submit the list described below. In accordance with Section 102.63(b) of the Board's Rules, if you are required to complete the form, you must have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition responding to the issues raised in another party's Statement of Position, such that it is received no later than noon three business days before the date of the hearing. A separate form must be completed for each timely filed and properly served Statement of Position you receive. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You must E-File your Responsive Statement of Position at www.NLRB.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed. Note that if you are completing this form as a PDF downloaded from www.NLRB.gov, the form will lock upon signature and no further editing may be made.**

Required List: In addition to responding to the issues raised in another party's Statement of Position, if any, the Employer-Petitioner in an RM case is required to file and serve on the parties a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. This list must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the list in the required form, the list must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx

Consequences of Failure to Submit a Responsive Statement of Position: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

> A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

FORM NLRB-506
(12-20)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

RESPONSIVE STATEMENT OF POSITION – RC, RD or RM PETITION

DO NOT WRITE IN THIS SPACE	
Case No.	Date Filed
08-RC-284759	October 18, 2021

INSTRUCTIONS: *If a party has submitted and served on you a timely Statement of Position to an RC, RD or RM petition, the Petitioner must submit this Responsive Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and any attachments on each party named in the petition in this case such that it is received by noon local time, three business days prior to the hearing date specified in the Notice of Hearing. A separate form must be completed for each timely filed and properly served Statement of Position received by the Petitioner. The Petitioner-Employer in a RM case is required to file this Responsive Statement of Position and include an appropriate employee list without regard to whether another party has filed a Statement of Position.*

This Responsive Statement of Position is filed by the Petitioner in response to a Statement of Position received from the following party:

The Employer	**An Intervenor/Union**

1a. Full Name of Party Filing Responsive Statement of Position

1c. Business Phone	1d. Cell No.	1e. Fax No.	1f. E-Mail Address

1b. Address (Street and Number, City, State, and ZIP Code)

2. Identify all issues raised in the other party's Statement of Position that you dispute and describe the basis of your dispute:

a. EMPLOYER NAME/IDENTITY [Box 1a of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

b. JURISDICTION [Box 2 of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

c. APPROPRIATENESS OF UNIT [Boxes 3, 3a and 3b of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

d. INDIVIDUAL ELIGIBILITY [Box 4 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

e. BARS TO ELECTION [Box 5 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

f. ALL OTHER ISSUES [Box 6 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

g. ELECTION DETAILS [Boxes 8a, 8b, 8c, 8d, 8e, 8f, and 8g of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

Full Name and Title of Authorized Representative	Signature of Authorized Representative	Date

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001) PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

Please fill all necessary fields on the form PRIOR to digitally signing. To make changes after the form has been signed, right-click on the signature field and click "clear signature." Once complete, please sign the form.

FORM NLRB-4701
(9-03)

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

Individual

and

CASE 08-RC-284759

Kenyon College

☒ **REGIONAL DIRECTOR**

☐ **EXECUTIVE SECRETARY**
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ **GENERAL COUNSEL**
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF
Employer - Kenyon College

IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☒ **REPRESENTATIVE IS AN ATTORNEY**

☒ **IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.**

(REPRESENTATIVE INFORMATION)

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MAILING ADDRESS: 250 Vesey Street,c/o Jones Day
New York NY

E-MAIL ADDRESS: jkastin@jonesday.com

OFFICE TELEPHONE NUMBER: 2123263923

CELL PHONE NUMBER: _____ ***FAX:*** 2127557306

SIGNATURE: _____
(Please sign in ink.)

DATE: Wednesday, October 20, 2021 4:30 PM Eastern Standard Time

[1] IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

KENYON COLLEGE EMPLOYER, and KENYON STUDENT WORKERS, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) PETITIONER.	)	CASE 08-RC-284759

MOTION FOR INDEFINITE EXTENSION OF TIME TO FILE STATEMENT OF POSITION

On October 18, 2021, the Kenyon Student Workers' Organizing Committee ("KSWOC"), affiliated with the United Electrical, Radio and Machine Workers of America (UE) (the "Union"), filed an election Petition with the National Labor Relations Board ("NLRB" or "Board"), seeking to represent a wall-to-wall unit of undergraduate student workers at Kenyon College ("Kenyon"). KSWOC's Petition raises two compelling issues that require extension of the deadlines in the NLRB's Election Rules, if not an immediate stay of the Petition: *First,* KSWOC asks Region 8 to take the unprecedented step of exercising jurisdiction over a proposed wall-to-wall bargaining unit composed entirely of undergraduate student workers, raising a threshold jurisdictional question that the Board must resolve. *Second,* even if the Board has jurisdiction over undergraduate student workers, Kenyon cannot comply with the Election Rule's disclosure requirements, much less within the NLRB's deadlines, because the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, the federal privacy statute

protecting students' information, prohibits that disclosure without reasonable notice, informed consent and a lawfully-issued subpoena. Because these threshold issues undeniably provide "good cause" to extend the deadlines in the Election Rules here, pursuant to 29 CFR § 102.63, Kenyon hereby requests an indefinite extension of time to post the Notice of Petition for Election and file its Statement of Position with the Initial Lists, as well as an indefinite postponement of the hearing. 29 CFR § 102.63(b)(1) ("The Regional Director may postpone the time for filing and serving the Statement of Position upon request of a party showing good cause."); 29 CFR § 102.63(a)(1) ("The Regional Director may postpone the hearing upon request of a party showing good cause.").[1]

The Board's 2015 Election Rules impose deadlines on Kenyon that directly conflict with its obligations under FERPA. The Rules require Kenyon to produce – in an Initial List to be filed as part of Kenyon's Statement of Position *just eight business days* after the Notice of Hearing – "the full names, work locations, shifts, and job classifications of all individuals in the proposed unit" prior to the hearing, 29 CFR § 102.63(b)(1)(i)(C). If Kenyon does not provide this Initial List with its Statement of Position, the Board's Rules state that it risks waiving its legal positions on the inappropriateness of a proposed unit that the Union estimates contains approximately 600 students—individuals who work temporarily and often episodically in dozens of different positions in dozens of different departments at Kenyon. *See* 29 CFR § 102.66 ("If the employer fails to timely furnish the lists of employees described in § 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of

[1] Kenyon is simultaneously filing a Motion to Dismiss or, In the Alternative, Stay, asking the NLRB to dismiss the Petition or stay it pending the NLRB's resolution of these important questions.

the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing.").

Despite this risk under the NLRB's administrative rules, Kenyon cannot comply with the Rule's disclosure requirements because a federal statute, FERPA, prohibits Kenyon from disclosing this information about its students. Under FERPA, most information contained in education records cannot be disclosed without advance consent from the affected students. *See* 20 U.S.C. § 1232g(b). Student work records are expressly included within the definition of "educational records" for this purpose. 34 CFR § 99.3(b)(3)(ii) ("Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records."). Absent consent—which Kenyon does not have from its student workers—certain limited information denominated "directory information" may be disclosed, but only after Kenyon has provided students notice of the planned disclosure and a "reasonable period of time" for hundreds of affected students to object. 20 U.S.C. § 1232g(a)(5)(B); 34 CFR § 99.37. For information that does not qualify as directory information under FERPA, Kenyon can disclose the information without consent only pursuant to a "lawfully issued subpoena." 20 U.S.C. § 1232g(b)(2)(B); 34 CFR § 99.31(a)(9). Even with a subpoena, however, Kenyon must give affected students notice and an opportunity to object to the disclosure. 20 U.S.C. § 1232g(b)(2)(B); 34 CFR § 99.31(a)(9)(ii). These same disclosure issues arise in conjunction with Kenyon's right to request that the evidence of interest be checked against an employer-provided payroll list (*see* NLRB Case Handling Manual, Part Two, Representation Case Proceedings § 11030.1); FERPA prevents Kenyon from providing this list, and the Board cannot deprive Kenyon of this important right by implementing rules that are inconsistent with federal privacy law. And further disclosure issues would inevitably arise in the

context of a hearing on the Petition and preparation of a Voter List, which would involve disclosing even more information about Kenyon students despite FERPA.

FERPA's *statutory requirements* protecting student privacy clearly take precedence over the NLRB's conflicting *administrative rules* on disclosure of individualized information about undergraduate students. *See, e.g., Nat'l Fam. Plan. & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 829 (D.C. Cir. 2006) ("[A] valid statute always prevails over a conflicting regulation."); *Ohio v. United States Army Corps of Engineers*, 259 F. Supp. 3d 732, 760 (N.D. Ohio 2017) ("Congressionally passed statutes trump agency regulations."). Because FERPA prevents Kenyon from complying with the Board's disclosure requirements, much less within the eight-day and fourteen-day timelines under the Board's Election Rules, Kenyon requests the Region to extend indefinitely the time for Kenyon to post the Notice of Petition and file its Statement of Position and Initial List, and to postpone the hearing date, until after the NLRB decides Kenyon's Motion to Dismiss or, In the Alternative, Stay the RC Petition.

Kenyon's Motion to Dismiss also raises a significant, threshold jurisdictional question that the NLRB must resolve before processing the RC Petition – namely, the unresolved question of whether the Board can, or should, exercise jurisdiction over undergraduate students at a private four-year college. As explained in Kenyon's Motion, there are myriad reasons that the Act does not apply to undergraduate student workers, and strong policy reasons, regardless, that require the NLRB to decline to assert jurisdiction over the unit sought here. Particularly given the high rate of turnover of Kenyon's student workers, it would serve no practical purpose, and only waste the Board's and the parties' resources, to process the Election Petition with its Initial Lists relating to about 600 students, much less to hold an election, before that Motion is resolved. Nor is there any justification for intruding on student privacy in the meantime, before the NLRB

resolves the fundamental jurisdictional questions. Only by extending *all* of the Election Rule's deadlines indefinitely – absent a complete stay of the Petition – can Kenyon students and their families be afforded the privacy protections guaranteed under FERPA.

Kenyon therefore respectfully requests the Region to extend the time for Kenyon to post the Notice of Petition and file its Statement of Position and Initial Lists, and to postpone the hearing date, until the Board resolves its Motion to Dismiss. Absent an extension tied to the Board's resolution of the threshold jurisdictional question, Kenyon requests that all of the deadlines be extended by 45 days to ensure that Kenyon can meet its obligations under FERPA and can ensure that students and their families have a reasonable amount of time to consent to the disclosure of their information or challenge any NLRB subpoena for their information.

CONCLUSION

For the foregoing reasons, Kenyon respectfully requests an indefinite extension of time to post the Notice of Petition for Election and to file its Statement of Position with the Initial Lists, as well as an indefinite postponement of the hearing.

Dated: October 21, 2021

Respectfully Submitted,
/s/ Jacqueline Holmes

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CERTIFICATE OF SERVICE

I hereby certify that on this day, October 21, 2021, a true and correct copy of the foregoing Motion was served via e-mail addressed as follows:

Mark Meinster
International Representative United Electrical, Radio and Machine Workers of America
mark.meinster@ueunion.org

/s/ Jacqueline Holmes

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

KENYON COLLEGE EMPLOYER, and KENYON STUDENT WORKERS, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) PETITIONER.	)	CASE 08-RC-284759

MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY RC PETITION

On October 18, 2021, the Kenyon Student Workers' Organizing Committee ("KSWOC"), affiliated with the United Electrical, Radio and Machine Workers of America (UE) (the "Union"), filed an election Petition with the National Labor Relations Board ("NLRB" or "Board"), seeking to represent a wall-to-wall unit of "all hourly paid student employees of Kenyon College." *See* Petition. KSWOC's Petition asks Region 8 of the NLRB to take the unprecedented step of exercising jurisdiction over a proposed wall-to-wall bargaining unit of *exclusively* undergraduate student workers. The NLRB has never held that the National Labor Relations Act ("NLRA" or "Act") extends to a unit of exclusively undergraduate students, much less found a wall-to-wall unit of such students appropriate. Nor has the NLRB ever reconciled the inescapable conflict that its *administrative election rules* create with the *federal statute* that protects the privacy interests of undergraduate students. *See* Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. Significantly, the NLRB's 2015 Election Rules were adopted at a time when Board law

had *consistently excluded* undergraduate students from the Act's coverage and when the Board rejected as purely hypothetical any collision with FERPA's student privacy protections. *See* 79 Fed. Reg. 74352 (Dec. 15, 2014); *San Francisco Art Institute*, 226 NLRB 1251, 1252 (1976); *Northwestern University*, 362 NLRB 1350, 1352 (2015). Because the Petition raises significant jurisdictional and federal privacy issues that are no longer hypothetical, the Region should dismiss the Petition—or, at a minimum, stay the Petition pending the NLRB's resolution of these threshold questions.

The Region has the authority to dismiss this Petition pursuant to § 102.65(a) of the Board's Rules and Regulations. *See* NLRB Case Handling Manual, Part Two, Representation Case Proceedings ("CHM"), § 11141 ("The Regional Director may rule on prehearing motions filed by the parties. . . . Motions to Dismiss petitions . . . are normally ruled on by the Regional Director."); 29 CFR § 102.71(a) ("If, after a petition has been filed and at any time prior to the close of hearing, it shall appear to the Regional Director that no further proceedings are warranted, the Regional Director may dismiss the petition by administrative action."). The Board's Case Handling Manual, moreover, makes clear that "a case should not proceed to an election agreement or to hearing if the Board would not assert jurisdiction, if the unit involved is inappropriate, etc." CHM § 11100. In this case, dismissal of the Petition is necessary given the irrefutable facts showing that the Board lacks statutory jurisdiction over the proposed bargaining unit of exclusively undergraduate students, not statutory employees. And even if the Board could exercise jurisdiction, the undisputed facts demonstrate that it should decline to assert jurisdiction over Kenyon's undergraduate students in this particular case because it would not effectuate the Act's purposes.

If the Region does not dismiss the Petition, Kenyon respectfully requests the Region to stay further proceedings, pursuant to § 102.67(j) of the Board's Rules and Regulations, pending the

Board's resolution of this important jurisdictional issue. Because this is undoubtedly a novel, threshold jurisdictional question, the Region should not move forward with a hearing and possible election before the Board has had the opportunity to weigh in. In addition to avoiding the potentially unnecessary and expensive process of a hearing and possible election, a stay would avoid impermissible intrusions into student privacy and prevent the imminent head-on collision between the NLRB's administrative election rules and FERPA. Indeed, absent a stay, Kenyon faces an impossible Catch 22: it risks violating FERPA and its students' privacy if it attempts to comply with the NLRB Election Rules' required disclosure of individualized student information, and it risks possible waivers under the Election Rules if it declines, under FERPA, to comply with those disclosures within the Rules' short deadlines. That conflict is no longer hypothetical: it is squarely presented here, and the Board cannot proceed until it is resolved.

Finally, staying further proceedings until the important jurisdictional question is resolved is necessary to protect the Act's fundamental purpose of providing full freedom to express a choice *for or against* collective bargaining representation. Kenyon fully respects the rights of *employees* to organize under the NLRA and, in fact, has collective bargaining agreements in place with three unions representing *employees* in its security, facilities and maintenance departments. But Kenyon's student workers are *students*, not statutory employees, and they attend Kenyon for an *education*, not a job. Even KSWOC concedes the substantial semester-to-semester turnover in student workers at Kenyon, where about 25% of its students graduate and leave each year, and where students choose to work some semesters but not others depending on their academic needs. Inevitably, that means that, if an election proceeds this semester despite these jurisdictional questions and ballots remain uncounted pending a request for NLRB review, the population of students working at Kenyon if and when the ballots are counted will not be the same as, nor will

it be representative of, the population of student workers who actually voted in the election a semester (or several semesters) before the ballot count.

That perverse scenario would directly undermine the Act's policy of promoting free choice for or against union representation. Only a stay of the current Petition can ensure that, if the Board ultimately concludes it has jurisdiction over a unit of exclusively undergraduate students (which it should not do), an election at that time reflects the free choice of a majority of bargaining unit members.

FACTS

Kenyon is the oldest private college in Ohio, with approximately 1,900 undergraduate students and 600 faculty and staff. Exh. A, ¶ 3 (Declaration of Jeffrey Bowman). Kenyon has no graduate programs. *Id*. ¶ 3.

Students may pursue on-campus work while enrolled at Kenyon both to satisfy the requirements of their financial aid packages and otherwise to benefit their educations. Kenyon is committed to making its education accessible regardless of a student's financial circumstances and, therefore, meets 100% of students' demonstrated financial need for all four years of the undergraduate college experience. *Id*. ¶ 5. For many students, a portion of Kenyon's financial aid is provided in the form of federal work-study funding. *Id*. This funding comes from the Federal Work-Study Program, which requires compliance with federal regulations, including limits on the types of work students can be assigned, the hours a student may work, and how students may be paid. *See id*.; 34 CFR Pt. 675.

KSWOC has acknowledged that all Kenyon undergraduate student positions have an educational component and, indeed, that Kenyon undergraduate students' "working conditions are [their] learning conditions." *See* Exh. B (9/7/20 KSWOC email). Many student positions have a direct educational component, such as requiring that student workers enroll in a particular course

at Kenyon while or prior to working in the position. Exh. A ¶ 9. For other positions, the educational component is experiential, with students allowed to work in positions related to their courses of study. *Id*. Kenyon creates these positions specifically and only for its students, and only students currently enrolled at Kenyon can fill these positions—and students automatically lose their positions if they withdraw (or are withdrawn) from the College. *Id*. ¶ 5. Because academics are the primary focus, students are not permitted to work more than 20 hours per week during the academic year, although most students work far fewer hours—around a third of Kenyon's student workers average less than four hours per week in their student positions (notably less than the NLRB's *Davison-Paxon* rule for part-time employee eligibility to vote in an election, *see* 185 NLRB 21, 24 (1970)). Exh. A ¶ 8.

The exact positions available to students vary from semester to semester, with each department retaining significant flexibility to identify and create positions of interest to students. Students have access to over 100 different positions in nearly 50 different departments across campus, working directly with different mentors and supervisors in those departments. Exh. A ¶ 10. Student positions are frequently filled on a semester-by-semester basis, with wide variation in the amount of time students spend working (e.g., no hours to 20 hours per week). *Id.* ¶¶ 8, 10. Given the flexibility of undergraduate student work, and the limitation that students may only retain their positions during their relatively short time enrolled as Kenyon undergraduates, turnover in student positions is high. In a typical semester, approximately 25 percent of on-campus positions are filled by students who have not previously held an on-campus position; the percentage of students who are new to their specific position in a given semester is higher still. *Id*. ¶ 11. Thus, as the Union's (b) (6), (b) (7)(C) has conceded, the student worker population has "100 percent turnover every year" for some groups. *See* Exh. C (5/4/21 (b) (6), (b) (7)(C) Email).

Students obtain work positions through a process entirely separate from the College's process for hiring its employees. Exh. A ¶ 6. Only Kenyon undergraduate students can fill work-study and student work positions; no external or non-student applicants are eligible. *Id*. Kenyon selects students for those positions based on their academic needs and interests, prioritizing students needing work-study to fulfill their financial aid packages. *Id*. These student positions are not core to the College's business operations; for example, Kenyon operates the Kenyon Farm to allow student workers to further their educations in public policy, sustainability, and farming practices, even though the Farm serves no core business operation and generates no revenues. *Id*. ¶ 9. By contrast, Kenyon hires its *employees* from external sources to perform essential campus functions based on those employees' skills and qualifications. *Id*. ¶ 7. For example, it hires employees to provide academic and other support to its students; it hires employees to provide maintenance services (and those employees are represented by UE Local 712); it hires employees to provide grounds-keeping and custodial services (and those employees are represented by International Association of Machinists and Aerospace Workers Local 2794); and it hires employees to provide campus safety and security (and those employees are represented by the International Union, Security, Police and Fire Professionals of America). *Id*. None of those employees are undergraduate students of the College, and none are subject to the College's academic procedures or standards. *Id*.

Kenyon's student workers also have a remarkable degree of flexibility regarding their work schedules as compared to employees. *Id*. ¶ 8. As the wide variation in many student workers' week-to-week hours reflects, many students are able to exercise significant control over when they choose to work. *Id*. Because academic demands must always take precedence, students can schedule their work around their course schedules or academic deadlines. *Id*. And student workers

have significant latitude to reschedule their work and make it up at more convenient times to accommodate academic demands. *Id*. College employees, by contrast, work specific schedules and regular hours, with attendance obligations that apply to typical employees.

On October 18, 2021, the Union filed its Election Petition, seeking to represent a wall-to-wall unit of "all hourly paid student employees of Kenyon College," which the Union numbers at approximately 600 students. *See* Petition. The Union seeks an election on November 8 and 9, 2021.

ARGUMENT

I. THE REGION SHOULD DISMISS THE PETITION BECAUSE KENYON'S UNDERGRADUATE STUDENT WORKERS ARE NOT STATUTORY EMPLOYEES.

For over a half century, the Board has struggled with deciding whether *university graduate students* are statutory employees under the NLRA, reversing its position several times because of the legal and policy implications of grafting labor law principles onto fundamentally educational relationships.[1] Those implications are significantly amplified where, as here, *undergraduate college students* are involved. Thus, to assert jurisdiction over the proposed bargaining unit, the Board would have to do something that it has never done before: hold that a group composed solely of undergraduate students at a private four-year college are "employees" within the meaning of the Act. The Board should decline to do so and dismiss the Petition.

[1] *See Cornell Univ*., 183 NLRB 329, 336 (1970) (asserting jurisdiction over private universities); *Adelphi Univ.,* 195 NLRB 639, 640 (1972) (graduate teaching and research assistants were "primarily students"); *The Leland Stanford Junior Univ*., 214 NLRB 621, 623 (1974) (graduate students were "primarily students" who "are not employees within the meaning" of the Act); *New York Univ*., 332 NLRB 1205, 1207-08 (2000) (graduate assistants who generally had completed coursework were employees like regular faculty); *Brown University*, 342 NLRB 483, 483 (2004) (graduate student assistants were not statutory employees); *The Trustees of Columbia Univ*, 364 NLRB No. 90, at *5 (2016) (graduate student assistants were employees).

A. Kenyon's Undergraduate Student Workers Are Unlike Typical Employees And Are Not Subject to the Act's Coverage

The Board has *never* decided to recognize a bargaining unit comprised entirely of undergraduate student workers. When the Board was first asked to recognize a unit of undergraduate students in 1976, it did not hesitate to find that the unit would "not effectuate the policies of the Act" given "the brief nature of the students' employment tenure, . . . the nature of compensation for some of the students, and . . . the fact that students are concerned primarily with their studies rather than with their part-time employment." *San Francisco Art Institute*, 226 NLRB at 1252.[2] More recently, when faced with a request for recognition of a union composed of undergraduate students in *Northwestern University*, the Board again declined to assert jurisdiction, because doing so would not effectuate the Act's purposes. 362 NLRB at 1352.

These cases are consistent with the Board's overall approach to determining employee status, in which it "looks at the employer's relationship with" the purported employees. *Goodwill Indus. of Tidewater, Inc*., 304 NLRB 767, 768 (1991). "When the relationship is guided to a great extent by business considerations and may be characterized as a typically industrial relationship, statutory employee status has been found." *Id*. But when other considerations predominate, and "*working conditions are not typical of private sector working conditions, the Board has indicated that it will not find statutory employee status*." *Id*. (emphasis added). In the academic context, those considerations must be informed, too, by the Supreme Court's admonition that "principles

[2] Although the Board in *Columbia* held that *San Francisco Art Institute* should be overruled to the extent it established a *per se* rule that students were never statutory employees of their institution, 364 NLRB No. 90, at *24 n.130, the Board's decision does not suggest that *San Francisco Art Institute* should be overruled to the extent it does not conflict with *Columbia*.

developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'" *NLRB v. Yeshiva University*, 444 U.S. 672, 681 (1980).[3]

That Kenyon students' working conditions are not "typical of private sector working conditions" is not in dispute here: the Union and KSWOC have, from the start, conceded that "[*o*]*ur working conditions are our learning conditions*." *See* Exh. B (emphasis added). Kenyon's relationship with its students is indisputably an academic one; it is entirely unlike a typical employment relationship where the employee performs work for the employer's benefit and receives remuneration in return. Among other things, Kenyon's student workers are *students* fulfilling their educational goals at an undergraduate college where, they admit, "*all of our jobs have an educational component*" (Exh. D (1/8/21 KSWOC email) (emphasis added)); their focus is on academics, not employment; and they attend Kenyon for an education, not a job. Kenyon's student positions are open *only* to Kenyon students and created to benefit *only* Kenyon students; they do not exist to generate revenue for Kenyon and are not part of Kenyon's core operations. Exh. A ¶¶ 4, 9. Kenyon's "remuneration" for student work, moreover, is not like that of typical employers. Instead, remuneration may include some combination of grants, stipends, housing credits or hourly pay, and it is provided to ensure that students are eligible for federal work study funds and can financially support their educations. *Id*. ¶ 5. This arrangement is, therefore, fundamentally different than typical employment relationships that the NLRA covers, and Kenyon students are simply not employees under the NLRA.

[3] Consistent with this view, courts construing the term "employee" in the Fair Labor Standards Act have concluded that student workers do not necessarily constitute statutory employees. *See*, *e.g*., *Solis v. Laurelbrook Sanitarium & Sch., Inc*., 642 F.3d 518, 526 (6th Cir. 2011) ("identifying the primary beneficiary of a relationship provides the appropriate framework for determining employee status in the educational context").

B. The Board's Decision in *Columbia*, Which Involved A Unit Of Mostly Graduate Students, Does Not Require A Contrary Conclusion

The Board's decision in *The Trustees of Columbia Univ*, 364 NLRB No. 90 (2016), does not require a different conclusion and is not controlling here. In *Columbia,* the Board certified a unit of *mostly graduate student* teaching and research assistants, whom the Board found to be employees in that case. But neither the holding nor logic of *Columbia* extends to Kenyon's *exclusively undergraduate student workers*.

Even assuming *arguendo* that Kenyon's undergraduate students could meet the common law test of employee status on the most superficial level (which Kenyon does not concede),[4] they bear little, if any, resemblance to the graduate teaching assistants in *Columbia.* Those graduate students had already completed their undergraduate studies, regularly worked for five to nine years for the university, performed "work advanc[ing] a key business operation of the University," and performed work that provided substantial economic benefits to the school. 364 NLRB No. 90, at *17. By contrast, Kenyon's part-time, temporary student positions do not to fill any function that is core to any key business operation at the College. Kenyon's student workers, many of whom are freshmen, do not have college degrees or the traditional qualifications that typical employers seek. And Kenyon's student workers perform various part-time roles flexibly and episodically over the course of four years while they focus on getting their college degrees, working some semesters but not others, some weeks but not others, and some days but not others, based on their academic demands. They are distinctly unlike the graduate student assistants deemed employees in *Columbia*.[5]

[4] In the event of a hearing in this matter, Kenyon reserves its right to put on evidence establishing that its students do not meet the test of typical common law employees.

[5] The *Columbia* decision included a handful of undergraduate teaching assistants who performed the same work as the graduate teaching assistants who composed the bulk of the bargaining unit. Although the Board included

In any event, *Columbia* does not hold that *all* student workers are statutory employees. To the contrary, as the *Columbia* Board explained: "We do not hold that the Board is *required* to find workers to be statutory employees whenever they are common-law employees," but rather "only that the Board may and should find *here* that student assistants are statutory employees." 364 NLRB No. 90, at *5 (emphasis added). Over-reading *Columbia* and the common-law test for "employee" status would lead directly to absurd results. For example, it could lead to the irrational conclusion that undergraduate students are "employees" of their educational institution any time they receive financial aid from that institution—regardless of relative benefit to the student versus the college. Under such a strained reading, a scholarship student who is required to retain a certain grade point average or minimum number of credit hours might be under the College's "control or right of control," and a scholarship might constitute "compensation." But neither the Board nor any court has ever suggested that the NLRA or the common-law test should be construed that broadly, and the Board has instead consistently maintained "that collective bargaining and education occupy different institutional spheres" within the university setting. *Columbia*, 364 NLRB No. 90, at *8.

Any fair reading of the Board's decision in *Columbia* must account for this reality—at some point, the relationship between student and college falls outside the Board's jurisdiction. Rather than setting forth a broad rule, then, *Columbia* is limited, by its own terms, to its factual setting where graduate students regularly performed core teaching functions that benefited a key business operation of a large university—totally unlike the undergraduate students here who

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those undergraduate students in the unit, it did so based on their similarity to the graduate students. 364 NLRB No. 90, at *24 n.124. No such circumstances are present here.

perform part-time, temporary non-core experiential work at a small undergraduate college to benefit their educational and personal development.

II. EXERCISING JURISDICTION OVER KENYON'S UNDERGRADUATE STUDENT WORKERS WOULD NOT FURTHER THE NLRA'S POLICIES.

"[E]ven when the Board has the statutory authority to act . . . 'the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.'" *Northwestern Univ.*, 362 NLRB at 1352; *see Columbia Univ.*, 364 NLRB No. 90, at *1 (to make the employee status determination, the Board must "interpret the language of the statute in light of its policies"); *WBAI Pacifica Found.*, 328 NLRB 1273, 1275 (1999) ("At the heart of each of the Court's decisions is the principle that employee status must be determined against the background of the policies and purposes of the Act."). Regardless of whether Kenyon's undergraduate students could qualify as statutory employees, then, the Board can and should decline to exercise jurisdiction because "it would not promote stability in labor relations to assert jurisdiction" over these particular undergraduate student workers—just as the Board did in *Northwestern* when it declined to extend its jurisdiction to those undergraduate students. 362 NLRB at 1352.

A. The Proposed Fluctuating Unit of Temporary Undergraduate Student Workers Is Irreconcilable with the Act's Fundamental Purpose of Ensuring Free Choice For or Against Union Representation.

The NLRA is designed to support workers' "full freedom to express a choice *for or against* collective-bargaining representation," *Columbia*, 364 NLRB No. 90, at *7 (emphasis added and quotation marks omitted), in a bargaining unit that is both stable and appropriate under Board law. *See* 29 U.S.C. § 159(a); *cf. MJM Studios of New York, Inc.*, 336 NLRB 1255, 1256 (2001) ("To warrant an immediate election where there is definite evidence of an expanding or contracting unit, the present work complement must be substantial and representative of the ultimate complement

to be employed in the near future . . ."). That outcome is unachievable in an undergraduate college setting where the student worker population turns over constantly and where free choice cannot be fulfilled. Undergraduate student workers' tenure is so brief, their hours are so few and irregular, and their turnover from semester-to-semester and year-to-year is so high that it is impossible to define a stable and appropriate unit, much less certify that the *majority* supports union representation at any given moment. In such an inherently unstable unit, any election on any particular date would not guarantee that a majority of workers have had the full freedom to express their choice, because by the time the votes are tallied (and surely by the time any contract is negotiated), the unit's composition will have changed materially and significantly—a fact that KSWOC itself has conceded. *See* Exh. C (acknowledging 100% turnover in some worker groups from year-to-year).

Thus, the Act's fundamental policy of protecting Section 7's guarantee of free choice for or against collective representation cannot be served—and, indeed, would be defeated—where one group of undergraduate students, at a snapshot in time in a random week in a random semester, elects union representation in a manner that deprives other students (filling a job a week, month, or semester later) of their free choice. *See San Francisco Art Institute*, 226 NLRB at 1252 (holding that it would "not effectuate the policies of the Act" to assert jurisdiction over art students given "the brief nature of the students' employment tenure"); *MJM Studios of N.Y., Inc*., 336 NLRB at 1256 (election should not be directed where, in the near future, few of the existing contingent of employees will remain in the unit). For this reason, the Board should exercise its discretion to decline jurisdiction over Kenyon's undergraduate student workers.

B. Kenyon Student Workers' Learning Conditions Are Outside The Act's Coverage And Its Policies Promoting Collective Bargaining

The Act is also designed to promote stability in labor relations and collective bargaining over terms and conditions of employment—not bargaining between undergraduate student workers and their education provider over "learning conditions" that they concede are their "working conditions." Exh. B. It would not promote federal labor policy—and it would directly interfere with Kenyon's educational policy and its support for "students' academic or personal development" (*Columbia,* 364 NLRB No. 90, at *24 n.124)—to apply the NLRA to those learning conditions, which go to the core of Kenyon's educational responsibilities to its 1,900 students and their families.

In the first place, Kenyon students' learning conditions are not mandatory subjects of bargaining under the NLRA, and it promotes no federal labor policy to force bargaining over permissive educational terms. Many Kenyon students receive work study as a component of their financial aid packages, with the attendant federal restrictions. Exh. A ¶ 5. Thus, bargaining over student compensation and work hours would necessarily entail bargaining about financial aid itself. Even KSWOC concedes it would be "impossible" to bargain over financial aid because, among other things, it would involve bargaining "for future workers who would not be enrolled at the time of ratification." *See* Exh. D. It would be just as impossible to bargain over the complementary academic courses required for certain jobs, which go to Kenyon's core academic policies, or any of the other "educational component[s]" that KSWOC concedes are part of *all* student jobs. *Id*.

Even mandatory bargaining subjects have little relevance in an undergraduate college setting, where standard labor contract provisions relating to, for example, seniority, scheduling and discipline would be nearly impossible to bargain. For example, K-SWOC's (b) (6), (b) (7)(C) admits that seniority rules—traditionally a bedrock principle in union contracts—are "not likely a

viable option for a workforce with 100% turnover every year." Exh. C. Nor would scheduling rules be viable, since a fundamental aspect of undergraduate student work is that academics *always* take precedence; unlike typical employees, Kenyon's student workers can opt to miss work, or make up their work on their own schedule, if academic demands intervene. Negotiating discipline rules and any attendant grievance process would be similarly fraught with complications, given their inevitable interference with students' essential relationships with the faculty and administrators who educate, grade and support them in their academic and personal growth, but whose education-based decisions might pit them against students in grievance proceedings or labor arbitrations.

In short, even if it were feasible to bargain over the learning conditions of Kenyon's student workers, that process is ill-suited to an undergraduate college setting and would plainly interfere with the academic and personal development of students attending Kenyon solely for an undergraduate education, *not a job*. Given the NLRA policy and educational issues at stake, the Board should conclude that these undergraduate workers fall outside its jurisdiction and dismiss the Petition.

III. IF THE REGION DOES NOT DISMISS THE PETITION, FURTHER PROCEEDINGS SHOULD BE STAYED PENDING RESOLUTION OF THE JURISDICTIONAL QUESTION AND THE CONFLICT BETWEEN THE BOARD'S ELECTION RULES AND FERPA

For the reasons described above, the Region should dismiss the petition outright prior to any hearing or election. If the Region concludes that the Board has and should exercise jurisdiction, however, the Region should still stay any further proceedings on this Petition to allow Kenyon the opportunity to seek the Board's review of that determination. Although Kenyon recognizes that representation cases are normally processed expeditiously, the Board has previously concluded that a stay is appropriate in an educational setting where a potentially

expensive and complex hearing and election could be rendered unnecessary. *See Pratt Institute*, 339 NLRB 971, 971 (2003). There are three compelling reasons to stay the Petition here:

- *First*, and most immediately, the Petition triggers the 2015 NLRB Election Rules' detailed and rapid disclosure requirements, adopted pre-*Columbia*, that collide head-on with federal statutory protection of student privacy interests. It is imperative to address FERPA's primacy over conflicting Board regulations, an issue that can be avoided if the Board declines jurisdiction.
- *Second,* given the threshold jurisdictional question that the NLRB has never resolved, "it is prudent . . . to stay the hearing until a decision is made as to the employee status" of the workers at issue, just as the Board did when the question of the Act's coverage of university graduate students was unsettled pre-*Columbia*. *See Pratt Institute*, 339 NLRB at 971.
- And *third,* proceeding to an election before these threshold issues are resolved risks depriving student workers of the Act's guarantee of a free and fair choice *for or against* union representation. The rapid turnover in Kenyon's student worker population makes it impossible to hold an election this semester on November 8th and 9th (as KWSOC proposes) that determines *majority* choice, as voters on that date will not be the same as, nor even representative of, potential voters one, two or three semesters from now while the Board decides whether to assert jurisdiction over Kenyon's undergraduates.

Taken together, these factors all demonstrate that a stay is appropriate if the Petition is not dismissed outright.

A. Kenyon's Obligations Under FERPA Render The Board's Procedures Inapplicable And Support An Immediate Stay

Most immediately, a stay is necessary to resolve the irreconcilable conflict between the NLRB's *administrative election rules* and the *federal statute* protecting student privacy. When the Board was considering the 2015 Election Rules, commenters quickly raised concerns that the employer disclosures required under the Rules could conflict with the obligations of colleges and universities under FERPA. *See* 79 Fed. Reg. 74352 (Dec. 15, 2014). Rather than substantively address these concerns, the Board dismissed the issue as a purely hypothetical conflict. *See id*. As the Board noted, "the proposed rule and FERPA could only come into conflict if graduate student employees are permitted to organize under the Act, which is not currently the case." *Id*. (citing *Brown University*, 342 NLRB 483 (2004)). The Board cannot sidestep the issue any longer. FERPA does not allow Kenyon to comply with the Board's regulatory disclosure requirements, including the Initial List and the Voter List required in the 2015 Election Rules, and the Board therefore cannot proceed to an election at Kenyon under the 2015 Election Rules.

1. Kenyon Cannot Disclose Student Information Except As Delineated In FERPA

Under FERPA, Kenyon cannot disclose information included in its students' education records without receiving consent from those students prior to the disclosure. 20 U.S.C. § 1232g(b)(1), (b)(2)(A); 34 CFR § 99.30. Student work records are expressly included in the definition of "educational records" subject to FERPA. 34 CFR § 99.3(b)(3)(ii) ("Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records."). While there are certain exceptions to FERPA's prior-consent rule, these exceptions are subject to strict substantive and procedural limitations – and none permits Kenyon to disclose student records to the NLRB within the NLRB's rigid election timelines.

First, schools are permitted to provide certain "directory information" regarding students, such as a student's name and major course of study, without first receiving consent. 20 U.S.C. § 1232g(a)(5)(A), (b). Even for this limited information, though, the school first provide *notice* of the planned disclosure and a "reasonable period of time" for hundreds of affected students—and their parents—to object. 20 U.S.C. § 1232g(a)(5)(B); 34 CFR § 99.37.

Second, Kenyon can disclose student information other than directory information, without prior student consent, *only* pursuant to a "judicial order" or "lawfully issued subpoena"—and *only* with prior notice and an opportunity to object. 20 U.S.C. § 1232g(b)(2)(B); 34 CFR § 99.31(a)(9). While the Board has subpoena authority under 29 U.S.C. § 161(1), FERPA's requirement of a "lawfully issued" subpoena creates a Catch-22 in this case: If the Board lacks jurisdiction over the student workers at issue, it lacks jurisdiction to issue a subpoena seeking their information. *See* 29 U.S.C. § 161 (granting subpoena power only to the extent "necessary and proper for the exercise of the powers vested in" the Board). Board subpoenas, of course, are enforceable only in federal court, and questions regarding the validity of such subpoenas can be resolved only by federal court. *NLRB v. Detroit Newspapers*, 185 F.3d 602, 605 (6th Cir. 1999) ("Despite the general policy that the NLRB should have jurisdiction in labor-management disputes, Congress specifically reserved to the federal courts the authority to provide for enforcement of subpoenas."); *NLRB v. Int'l Medication Sys., Ltd*., 640 F.2d 1110, 1115–16 (9th Cir. 1981) (same); *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 499 (4th Cir. 2011) (same). Because a subpoena that goes beyond an agency's statutory jurisdiction is not a "lawfully issued" subpoena, FERPA's safe harbor may not permit disclosure pursuant to a Board subpoena. See *United States v. Morton Salt Co*., 338 U.S. 632, 652 (1950) (agency subpoena lawful only if "the inquiry is within the authority of the agency . . .").

Regardless of whether an NLRB subpoena would permit disclosure in this case, though, Kenyon would still be required to provide students and their parents with notice of the proposed disclosure "in advance of the compliance" with the subpoena. 20 U.S.C.A. § 1232g(b)(2)(B). The notice must be sufficient to allow time so that "the parent or eligible student may seek protective action." 34 CFR § 99.31(a)(9)(ii).

2. Proceeding Under The 2015 Election Rules Would Violate FERPA

That the Board's 2015 Election Rules directly conflict with Kenyon's obligations under FERPA could not be more obvious. Undoubtedly, this federal statute – protecting the privacy interests of Kenyon students and their families – takes precedence over conflicting agency administrative rules. *Nat'l Fam. Plan. & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 829 (D.C. Cir. 2006) ("[A] valid statute always prevails over a conflicting regulation."); *Ohio v. United States Army Corps of Engineers*, 259 F. Supp. 3d 732, 760 (N.D. Ohio 2017) ("Congressionally passed statutes trump agency regulations."). Proceedings on this Petition thus cannot move forward unless and until these conflicts between the NLRB's administrative rules and this federal privacy statute are resolved.

The conflicts are tangible, immediate and unavoidable:

First, the 2015 Election Rules would require Kenyon to provide – in an Initial List to be filed *just eight business days* after the Notice of Petition – "the full names, work locations, shifts, and job classifications of all individuals in the proposed unit" prior to the hearing. 29 CFR § 102.63(b)(1)(i)(C). This extends well beyond "directory information" under FERPA. Even if some of the information were "directory information," however, Kenyon could only disclose it *after* providing notice of the planned disclosure and a "reasonable period of time" for hundreds of affected students and their parents to object. 20 U.S.C. § 1232g(a)(5)(B); 34 CFR § 99.37. But given the rapid timeline for disclosure under the Board's Election Rules, FERPA's required notice

and opportunity to object would not be possible here, and would certainly not be sufficient to provide students and their parents with "a reasonable period of time" to consent to disclosure of their personal information.

Second, it is obvious that much (if not all) of the information that Kenyon would have to disclose on the Initial List under the Board's Election Rules does not qualify as "directory information" subject to this exception, including, at a minimum, the students' shifts and work locations. *See* 20 U.S.C. § 1232g(a)(5)(A); 34 CFR § 99.31(a)(11). Kenyon can disclose that kind of information *only* pursuant to a lawfully issued subpoena—and *only* after students and their parents have been notified and provided an opportunity to seek protective action, such as by moving to quash the subpoena. It would be impossible for Kenyon to comply with these requirements within the *mere eight business days* permitted by the Board's Rules. That leaves Kenyon facing an impossible Catch 22: it risks violating FERPA and its students' privacy if it attempts to comply with the NLRB Election Rules' required disclosure of individualized student information on the Initial Lists, and it risks possible waivers under the Election Rules if it declines, under FERPA, to comply with those disclosures within the Rules' short deadlines.

Third, the Region cannot fulfill its obligations in processing the Petition without disclosure of a list of students' names, so that the Region can determine whether the Petition is even supported with a sufficient showing of interest among the claimed 600 workers in the proposed bargaining unit.[6] Indeed, "it is essential that a check of the adequacy of the showing of interest . . . be performed in every case *shortly after the filing of the petition,* in order that issues concerning the showing of interest will be resolved before the case progresses beyond the initial stages." CHM

[6] The Union's Petition claims that there are approximately 600 members of the proposed bargaining unit. Given the broad unit definition, Kenyon estimates that the number may be much higher, making a check of the showing of interest imperative for this matter to proceed.

§ 11020 (emphasis added); *see* CHM § 11030.1 (employers are entitled to request that the evidence of interest be checked against an employer-provided payroll list). But Kenyon cannot simply provide that list under FERPA without first complying with FERPA's procedural protections, and there is not time to do that within the Board's compressed timelines. The Board cannot force Kenyon to violate federal privacy law to avoid forfeiting this important substantive right to verify an adequate showing of interest, just as the Region itself cannot process the Petition unless it verifies an adequate showing of support.

Fourth, the Board's 2015 Election Rules would also penalize Kenyon for refusing to violate FERPA in other substantial ways. Indeed, under 29 CFR § 102.66, "If the employer fails to timely furnish the [required] lists of employees . . . , the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing." Such consequences cannot be squared with the bedrock principle that "Congressionally passed statutes trump agency regulations." *Army Corps of Engineers*, 259 F. Supp. 3d at 760. That is especially true where, as here, commenters on the 2015 Election Rules alerted the NLRB to this FERPA conflict, and the Board explicitly declined to resolve the conflict because, at that time, the Board had *consistently excluded* graduate and undergraduate students from the Act's coverage and the issue was purely hypothetical. *See* 79 Fed. Reg. 74352 (Dec. 15, 2014); *San Francisco Art Institute*, 226 NLRB at 1252; *Northwestern University*, 362 NLRB at 1352.

Finally, the intrusion into student privacy, and the accompanying conflict with federal law, only expands as the NLRB election process proceeds. If the Region were to direct an election, that decision would normally require Kenyon to produce, in only *two business days* from that decision, a Voter List that discloses "full names, work locations, shifts, job classifications, and

contact information (including home addresses, available personal email addresses, and available home and personal cellular 'cell' telephone numbers) of all eligible voters." *See* 29 CFR § 102.67(l). That information is precisely the type of private student information that FERPA protects from non-consensual disclosure, forcing Kenyon into the untenable position of having to risk violating student privacy under FERPA or risk waiving its position under the NLRA for not producing the lists required in the 2015 Election Rules.

Any potential FERPA issues could be avoided, of course, if the Region dismisses the Petition for lack of jurisdiction *before* Kenyon would otherwise be required to disclose any student information.

3. Student Privacy Interests Weigh Against Proceeding Before The Threshold Jurisdictional Issues Are Resolved

Even assuming the procedural requirements of FERPA could be satisfied through issuance of a subpoena, notice, and an opportunity to object, the student privacy interests at stake here would still counsel in favor of a stay. As courts have explained, FERPA is intended to "protect the privacy interests of students and their parents" by "limiting the transferability of their records without their consent." *United States v. Miami Univ.*, 294 F.3d 797, 806 (6th Cir. 2002) (quotation marks omitted). As is evident from the statutory scheme, "Congress holds student privacy interests in such high regard" that it often "places the privacy interest of students and parents above the federal government's interest in obtaining necessary data and records." *Id*. at 807. Thus, while FERPA-protected materials may be discoverable in litigation, "a party seeking the disclosure of school records must meet a significantly higher burden to show that need for the records outweighs the privacy interest of students." *Meyers v. Cincinnati Bd. of Educ.*, No. 1:17-CV-521, 2020 WL 6872920, at *2 (S.D. Ohio Nov. 23, 2020); *see also Ragusa v. Malverne Union Free Sch. Dist.*, 549 F. Supp. 2d 288, 292 (E.D.N.Y. 2008) (noting that a party "seeking disclosure of education

records protected by FERPA bears a significantly higher burden to justify disclosure than exists with respect to discovery of other kinds of information, such as business records" (quotation marks and alterations omitted)).

Those principles apply fully to the FERPA-protected information that the Board's Election Rules would require Kenyon to disclose here. Because such disclosures may ultimately prove to be wholly unnecessary if the Board declines to exercise jurisdiction, no disclosures should be required until that threshold question is resolved. Any other approach would fail to respect the heightened value Congress has placed on the privacy of student records.

B. The Petition Raises Novel Jurisdictional Issues That Should Be Resolved Prior To Any Hearing

A stay is necessary, in all events, so that the NLRB can resolve the novel jurisdictional issue that the Petition presents. While the Board has vacillated on the rights of *graduate student* assistants to organize under the Act, the Board has *never* ruled that the Act applies to a unit comprised entirely of *undergraduate students* working for their educational institution. Instead, the Board has repeatedly declined to do so. *Northwestern Univ.*, 362 NLRB at 1352; *San Francisco Art Institute*, 226 NLRB at 1252. The novelty of this Petition sweeps even beyond the Board's precedents, however: it takes the unprecedented step of seeking an election in a proposed "wall-to-wall" bargaining unit of what the Union estimates are 600 exclusively undergraduate student workers who work in more than 100 different positions in nearly 50 different departments across the campus. Exh. A ¶ 10. In these unique circumstances, it is far from clear that the Board could or would exert jurisdiction. What is clear, though, is that the Board itself will eventually need to address the jurisdictional question if the Region orders an election—the question with respect to a stay is whether the Board resolves that question before the expenditure of significant Board resources in a hearing and possible election. *See* 29 CFR § 102.67(d) (Board review is

appropriate where "a substantial question of law or policy is raised because of . . . [t]he absence of . . . officially reported Board precedent").

Addressing the threshold jurisdictional question prior to any hearing or election is the more prudent course here. As in *Pratt*, "[i]n the instant case, a hearing would be long and expensive," but the "hearing may prove unnecessary" depending on the Board's resolution of the jurisdictional issue. 339 NLRB at 971. As explained above, the proposed unit includes hundreds of students working in over 100 distinct positions across dozens of departments. The work performed, supervisors involved, compensation provided, qualifications required, expected duration of the position, and more, all vary by department and the specific positions at issue. A unit hearing would thus necessarily be lengthy and complex, as it would need to allow for significant evidence to determine the appropriateness of the proposed unit under the Board's fact-intensive "community of interest" standards. The hearing would also be complicated by the lack of any precedent at all for structuring bargaining units in the undergraduate college setting. Rapid employee turnover and substantial variation in weekly hours worked further complicate any efforts to determine who would be eligible to vote in any proposed election, as many students in the proposed unit do not even work the four-hour-per-week threshold that the Board normally applies to determine part-time voter eligibility. *See Davison-Paxon,* 185 NLRB at 24. Such a lengthy and complex hearing could be avoided altogether, however, if the Board declines to exercise jurisdiction over Kenyon's undergraduate student workers either as a matter of law or as an act of discretion, as it should in this case.

C. A Stay Would Promote the Act's Purpose of Ensuring Protection of Free Choice For or Against Union Representation

Finally, in this case, the Board's policy of favoring expeditious elections runs headlong into the Act's policy of promoting "full freedom to express a choice for or against collective-

bargaining representation." *Columbia*, 364 NLRB No. 90, at *7 (quotation marks omitted). Based on this principle of worker choice, in the industrial context, the Board has indicated that an immediate election is inappropriate where the current group of employees is not a "substantial and representative" portion of the group of employees that will exist in the near future. *MJM Studios of N.Y.*, 336 NLRB at 1256; *World S. Corp*., 215 NLRB 287, 287 (1974) (immediate election improper where it threatened to "unreasonably disenfranchise[] a substantial number of employees" given pending change in labor force). Similarly, rather than ordering an immediate election, the Board has delayed elections until the "next seasonal peak" for employers engaged in seasonal operations to ensure voters were representative of the employees who would be bound by the election results. *See, e.g., Indus. Forestry Ass'n*, 222 NLRB 295, 295 (1976).

The rapid turnover of student workers at Kenyon makes it impossible to ensure that the present complement of student workers is substantial and representative of the group of workers at any future time – much less that a *majority* of student workers at any one time supports union representation. There is no reason to exacerbate this difficulty by holding an election prematurely, before the threshold jurisdictional issues are resolved by the Board. If the Board does not resolve the jurisdictional issues in this case prior to an election, the ballots will almost certainly remain unopened and uncounted until the Board resolves that issue. *See* 29 CFR § 102.67(c) (providing that if a party seeks review of a direction of election within 10 business days of that decision, "all ballots shall be impounded and remain unopened pending" the Board's final ruling). Because an average of 25 percent of Kenyon student workers are entirely new in any given semester, Exh. A ¶ 11, and because many student workers do not work every semester (e.g., due to academic demands, sports commitments, study abroad), there is a real risk that an election held prior to a

decision on jurisdiction would reflect the views of a group that is not representative of the group of workers present when the ballots are ultimately counted.

This turnover thus makes it impossible to hold an election in November, near the end of this semester (as KWSOC proposes), that determines *majority* choice because it is inescapable that voters this semester will not be the same as potential voters one, two or three semesters from now. Only a stay can avoid this trampling on the Act's policies of ensuring free choice for or against union representation while the Board decides whether to take the unprecedented step of asserting jurisdiction over this group of exclusively undergraduate student workers.

CONCLUSION

For the foregoing reasons, Kenyon respectfully requests that the petition be dismissed or, in the alternative, stayed.

Dated: October 21, 2021

Respectfully Submitted,

/s/ Jacqueline Holmes

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Exhibit A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

KENYON COLLEGE EMPLOYER, and KENYON STUDENT WORKERS, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) PETITIONER.	)	CASE 08-RC-284759

DECLARATION OF JEFFREY BOWMAN

I, Jeffrey Bowman, declare and state as follows:

1. I have been employed by Kenyon College since 1997. I am currently the Provost. I have held this position since July 1, 2020.

2. I make this statement based on my personal knowledge. If called as a witness, I could and would competently testify to the facts contained here.

3. Kenyon is the oldest private college in Ohio, with approximately 1,900 undergraduate students and 600 faculty and staff. Kenyon has no graduate programs.

4. Kenyon maintains a program for its students to work on campus to further their educational goals. Within this program, positions are created for students and may be filled only by students currently enrolled at Kenyon. If students withdraw (or are withdrawn) from the College, they automatically lose their student worker positions. Hundreds of students participate in the student work program each year.

5. Kenyon is committed to meeting 100% of students' demonstrated financial need for all four years of the undergraduate college experience. For many students, a portion of Kenyon's financial aid is provided in the form of federal work-study funding. This funding comes from the Federal Work-Study Program, which requires compliance with federal regulations. Remuneration for student work may also include other grants, stipends, housing credits, or hourly pay.

6. The process for hiring student workers is entirely separate from the university's process for hiring employees of the College. Only Kenyon undergraduate students are eligible to fill work-study and student work positions at Kenyon. Students' academic needs, interests, and financial aid packages are generally considered when selecting students for these positions, with priority given to students needing work study to fulfill their financial aid packages.

7. Kenyon hires employees from external sources to perform essential campus functions. For example, Kenyon's maintenance services employees are represented by UE Local 712, Kenyon's groundskeeping and custodial services employees are represented by IAM Local 2794, and Kenyon's campus safety and security employees are represented by the International Union, Security, Police and Fire Professionals of America. None of these employees are undergraduate students at Kenyon.

8. Students are not permitted to work more than 20 hours per week during the academic year, regardless of how many student worker positions they hold. Most students remain well below this threshold, with about a third of student workers averaging less than four hours per week in their student positions. Student positions generally allow significant flexibility in scheduling to allow students to prioritize academic commitments, including latitude to schedule work around course schedules or to reschedule their work and make it up at more

convenient times. Kenyon's employees, by contrast, have attendance obligations in line with those typical for employees.

9. Certain student positions require student workers to enroll in a particular course at Kenyon while or prior to holding that position. Students are also permitted otherwise to work in positions related to their courses of study. For example, Kenyon operates the Kenyon Farm to allow student workers to further their educations in public policy, sustainability, and farming practices. The Farm serves no core business operation and generates no revenues. Other student positions similarly are not central to the College's business operations.

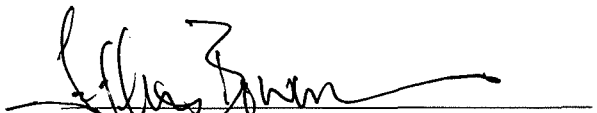
10. Student positions are typically created and filled on a semester-by-semester or year-to-year basis. Each of Kenyon's dozens of departments has significant discretion in the positions it creates for students, and students work directly with mentors and supervisors within the departments. Students have access to over 100 different positions in nearly 50 different departments across campus.

11. On average, approximately 25 percent of student workers in a given semester are new student workers. Among students who hold student positions in consecutive semesters, students are free to, and many do, switch positions between semesters.

12. Kenyon students may be removed from their work positions if their academic performance suffers. When students are not performing well in their student worker positions, Kenyon staff are encouraged to point them to on-campus support resources such as academic counseling, therapy, and mental and physical health resources. If a student's conduct in a student work position violates the student Code of Conduct, the student may be referred to college officials responsible for student discipline. Resulting discipline may go beyond the student's work position.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 21, 2021



Jeffrey Bowman

Exhibit B

Kenyon

(b) (6), (b) (7)(C) @kenyon.edu>

Second Demand for Voluntary Recognition

1 message

K-SWOC at Kenyon <union@kswoc.org> Mon, Sep 7, 2020 at 4:00 PM
To: decatur@kenyon.edu
Cc: (b) (6), (b) (7)(C) @kenyon.edu, (b) (6), (b) (7)(C) @kenyon.edu, (b) (6), (b) (7)(C) @kenyon.edu, (b) (6), (b) (7)(C) @kenyon.edu, (b) (6), (b) (7)(C) @kenyon.edu, (b) (6), (b) (7)(C) @kenyon.edu, (b) (6), (b) (7)(C) @kenyon.edu, (b) (6), (b) (7)(C) @kenyon.edu, (b) (6), (b) (7)(C) @kenyon.edu, (b) (6), (b) (7)(C) @kenyon.edu, (b) (6), (b) (7)(C) @kenyon.edu, (b) (6), (b) (7)(C) @kenyon.edu

Dear President Decatur,

As the elected representatives of the Kenyon Student Worker Organizing Committee (K-SWOC), we, the Steering Committee, are writing to request a meeting with you as soon as possible to discuss the College's recognition of a student worker union at Kenyon.

Student workers face major challenges in their workplaces, and those problems continue to arise. Right now, international student workers living abroad will lose work experience and a semester's worth of pay because the College refuses to offer them job opportunities and compensation. K-SWOC discussed the needs of international students during our Week of Action, but the College still needs to address them.

A path forward must be determined, but it must be decided by student workers and the College together. Only a student worker union would give student workers the power to negotiate fair and equitable terms of their employment with the College; moreover, a union protects that power. However, forming a union necessitates mutual understanding achieved through honest conversations and then real negotiations. We want to engage you in an open conversation, one that will cover our mutual concerns and the specifics of the union we aim to form.

Because student employment at Kenyon encompasses different types of work, and positions fluctuate from year to year, we understand there could be concerns about the size and composition of our bargaining unit, especially now, with the College operating partially remotely. Given the importance of these questions and continued uncertainty, we believe a meeting must be called sooner rather than later. These decisions cannot be made casually, but rather thoughtfully, with the student employees who will be affected by them as full and equal participants.

These decisions matter because they affect every relationship within the College community. For our part, we do not intend to disrupt the relationship between students and faculty, including where professors oversee student research funded by institutional grants. But we do not organize for ourselves alone. **Our working conditions are our learning conditions.** When we face harassment in our workplace; when our boss terminates our employment without notice; when we lose sleep because our job gets in the way; it affects our academic performance and strains our relationships with faculty. Students and faculty understand we must work together to make Kenyon a safer and happier community. We want to ensure a student workers union would contribute to that work, not detract from it.

A week into our public campaign, more student workers have decided to join the cause. Since we submitted our initial request for recognition, the number of student workers who signed cards increased by 25%. We have reached majority support in 7 sub-units representing more than two hundred student workers. We face common issues and challenges across departments, positions, and types of work, and because of these commonalities, student workers consistently recognize the need for an effective union that can speak with a strong voice.

And as our numbers grow, so does our support among the wider Kenyon community, with hundreds of students, faculty, parents, and alumni voicing their support on social media, emails to the campus, and in messages to our group. Today, we also received endorsements from U.S. Sens. Sherrod Brown and Bernie Sanders.

In all different ways, our community is coming to realize the value of a student worker union. We see clearly that a union does not contradict the mission of the College, the values that bound our community, or the broader purpose of a liberal arts education. In fact, we believe a union will help us achieve those highest ideals more fully. On this point, though, any doubt will be cleared not through roundabout ways, but in a conversation with student workers.

With this aim, we request a conversation with you and any other relevant members of the College's leadership, to be scheduled as soon as possible.

Respectfully,

The Steering Committee of the Kenyon Student Worker Organizing Committee

---

ATTACHMENTS:

1) Letter of endorsement from U.S. Senator Bernie Sanders (I-VT)
2) Video of endorsement from U.S. Senator Sherrod Brown (D-OH) (LINK)

Kenyon College 9-7-2020.pdf
53K

Exhibit C

Kenyon

(b) (6), (b) (7)(C) @kenyon.edu>

Note on Notification Today

(b) (6), (b) (7)(C) @ueunion.org> Tue, May 4, 2021 at 3:05 PM
To: (b) (6), (b) (7)(C) @kenyon.edu, (b) (6), (b) (7)(C) @kenyon.edu>

Hello,

In the notification I am about to send I point to the questions about the duration of the strike- something that is frowned upon by the NLRA. I wanted to note that I have heard some of this from ATs but after talking to them they do not feel like it was anything they are concerned about and came from a place of faculty trying to figure out how to make sure students get what they need while ATs are on strike. So, that message was not directed at you or your department and I want to thank you again for being accessible to ATs and responsible in dealing with the effects of the strike.

I meant to mention this yesterday but in the Fall in discussions with President Decatur and Trustees a concern was raised about what impact a contract would have on MT's ability to select their ATs. Internally we talked about this before and in the lead up to the meeting that got cancelled last week but for the record: the union has no interest- nor the expertise- to evaluate who is or is not qualified to be an AT and the only people qualified to do that are the faculty. There is an interest in figuring out a way to make these jobs more reliable (from a workers' perspective) but that will not include a mandate to hire ATs, outline of qualifications for the position (common in most union contracts), and a seniority dominated system (in every contract I have seen but not likely a viable option for a workforce with 100% turnover every year). This is only meant as a clarification and to address any concerns about the ATs intentions when we get to negotiations.

Hope your semester is winding up well,
--
(b) (6), (b) (7)(C)

United Electrical, Radio and Machine Workers of America
(b) (6), (b) (7)(C)

Exhibit D

Kenyon

President at Kenyon <president@kenyon.edu>

Response to Dec. 11 Letter

1 message

K-SWOC at Kenyon <union@kswoc.org> Fri, Jan 8, 2021 at 4:55 PM
To: [redacted]@cbjlawyers.com, President at Kenyon <president@kenyon.edu>, Sean Decatur <decatur@kenyon.edu>, Jeffrey Bowman <bowmanj@kenyon.edu>, [redacted]@dohio.org, bdenniston@goodwinlaw.com, [redacted]@mafgrp.com

Dear President Decatur, Provost Bowman, and members of the Board of Trustees,

The Kenyon Student Worker Organizing Committee (K-SWOC/UE), representing a significant majority of current Kenyon student workers, has carefully reviewed the Dec. 11 letter regarding unionization sent by President Decatur on behalf of the Board of Trustees. We would like to share some of the important feedback our members have provided with the Kenyon community and the Board of Trustees.

We begin this letter by thanking President Decatur and the Board of Trustees for the time and attention they have shown student workers throughout our unionization process, and to express that we look forward to continuing an open and productive relationship with the Board as this campaign continues. This past semester has been one of the most challenging in recent memory, and it has been heartening to see how the student community, especially student workers, has come together to strive for better working conditions, workplace equity, and fair compensation.

K-SWOC is also grateful that the Board has presented their concerns about student worker unionization so thoroughly, as they have now provided student workers with a starting point for a dialogue on this very important issue—a dialogue student workers have repeatedly asked the Board to engage in since Aug. 31. In the spirit of Kenyon College's mission to "engage in spirited, informed, and collaborative inquiry," K-SWOC believes the best way to address these questions is to hear from student workers themselves. That is why we invited the workers we represent to collectively craft a point-by-point response to the Board's concerns. The following statement has been written by the student workers that make up K-SWOC, and it draws directly from our experiences, concerns, and aspirations:

- Kenyon student workers agree that all of our jobs have some kind of educational component to them in a broad sense, but we do not believe that student workers must choose between obtaining an educational experience or being compensated fairly and treated with respect on the job. Tens of thousands of graduate students across the country, as well as multiple workplaces employing undergraduate student workers, have unionized at colleges and universities where, as the Board says, "the education of students is paramount." We are disappointed that the Board expects K-SWOC members to believe the educational value at institutions like the University of Chicago, Columbia University, Grinnell College, and Yale University—a unionized Ivy League graduate program that produced Kenyon's very own Provost, Professor Jeffrey Bowman—is somehow compromised because their student workers have unionized.
- Over the course of many meetings and organizing calls, K-SWOC has come to represent a growing majority of the student workers at Kenyon, including many who receive work study

assistance. The overlap between the work study population and the larger student workforce and the fact that K-SWOC members, like all union members, live in a larger community that is shaped by forces outside their respective workplaces means that issues concerning work study are indeed important to our membership. That being said, K-SWOC understands that not all issues unions advocate for or that affect union membership can be bargained over. It is uncertain whether scholarships even qualify as remuneration, stemming from the Northwestern rulings in 2014 and 2015, and we believe that any financial aid award would be, at best, a permissive subject of bargaining. Practically speaking, it would be impossible to bargain over this issue because it would require us to bargain for future workers who would not be enrolled at the time of ratification (depending on the timing and length of the contract) on an issue that stands well outside the terms and conditions of employment for student workers. This is an issue we would have been happy to clarify if raised, and we would like to reiterate our support for a just system of work-study support for students who need it.

- We also take issue with the portrayal of K-SWOC and the other unions as third party actors that are somehow not part of the Kenyon community. Any insinuation of the kind only serves as an attempt to drive a wedge between the hundreds of students in K-SWOC, our peers, and our professors. It also demonstrates a disregard for the hundreds of unionized staff at Kenyon who labor every day to make the college operate. Union members make sure our campus facilities are clean and fully operational, maintain the safety of the entire community, and keep us fed. Many members of both the recognized unions on campus and K-SWOC are continuing a multi-generational relationship that is central to Kenyon's existence as a functioning community. If all of these groups, with their overlapping connections to Kenyon, are outsiders, then who is part of the Kenyon community? Given earlier attempts by Kenyon's senior administration and Board of Trustees to bust Kenyon's unions, most recently in 2012-2013, we find this mischaracterization of unions, and those working on campus in particular, to be especially troubling.
- When the Board asserted that diverse workplaces cannot be adequately represented by a common union, it seems to have conveniently forgotten about UE Local 712, the union that represents Kenyon's skilled trades workers. Each member of that union has unique skills, motivations, and experiences that have led them to work at Kenyon and build a union with their fellow workers. Still, the Board is right to point to the diversity of Kenyon's student workers. Student workers fill hundreds of jobs around campus, and each position saves money for the College and keeps it running smoothly. But for all our differences, student workers are united by our pride in our work, our willingness to fight for our fellow workers' rights, and our abiding commitment to union democracy. The fact that K-SWOC has secured the support of a clear majority of student workers as a group and within all major classifications in very little time is proof that our diversity of experience is no obstacle to our commitment to one another's wellbeing. The Board is welcome to highlight our diversity, but it cannot ignore what unites us.
- As Kenyon students, K-SWOC members share an appreciation for the community's stated values of openness and accessibility. And as important stakeholders in the College's mission, we are committed to upholding democratic principles throughout our lives on campus, including in our workplaces. To this end, we hold open organizing meetings, share our intentions and ideas through public forums, and make concerted efforts to engage with all

members of the community, including faculty, staff, students, and the Board. In fact, 57 members of the faculty have signed a letter stating that "[they] do not believe that such a union threatens the integrity of the College, its mission, or the important relations we enjoy with our students." We agree with them, and have greatly appreciated their attention and feedback throughout our organizing process. The Board's letter does not provide evidence for its claim that the existence of our union would dramatically change relationships between students and faculty. However, we fear that by stating that it would, the Board itself intends to intervene in this central aspect of the Kenyon experience by insisting that a student union must necessarily be somehow an obstacle to the formation of bonds between students and their professors.

- Student Council, Campus Senate, and other existing governance structures play a critical role in Kenyon's community. Members of K-SWOC have the utmost respect for the work done by elected representatives of the student body in these institutions. However, neither Student Council nor Campus Senate are designed to represent student workers in their relationship with the College as employees. If access to democratic institutions should bar workers from a union, then public sector unions representing teachers, social workers, nurses, and more would have no reason to exist. Further, it is our understanding that the College, if it is arguing that Student Council and Campus Senate adequately represent student workers as employees, would be in violation of Section 8(a)(2) of the National Labor Relations Act (NLRA), which prohibits an employer from establishing a "company union" that it dominates or controls. Rather than undermining the democratic processes that already exist at Kenyon, we believe a union would complement these institutions—just as student worker unions at Grinnell College, the University of Chicago, Columbia University, and Yale University each complement separate student government structures that exist at their respective institutions.
- The Board presented a grossly misleading assertion that recognizing a union today would disenfranchise student workers in the future. Every workforce in any unionized workplace has the federally-guaranteed right to vote to decertify their union, just as they have the right to form a union in the first place. The Board's argument also implies that no decisions should ever be made at the College that would apply to future students; by this logic, the Board's rejection of recognition now disenfranchises future student workers who would want to join a union. Additionally, this assertion further ignores the student workers in K-SWOC's ranks who have been laid off with no explanation, significantly underpaid, put in harm's way by their managers, and subjected to unjust workplace conditions. These experiences have led a majority of student workers to agree that the protection a union provides is a necessity for student workers now and in the future. By rejecting this demand, it is the Board, not the union, that is subverting democracy and treating student workers unfairly. Finally, the Board's arguments on this issue are unsettlingly close to the arguments used in Kenyon's past regarding the question of becoming a coeducational institution, introducing interdisciplinary programs, and increasing the emphasis on student-faculty collaboration in research. All of these changes did indeed alter the college for succeeding generations of students and staff, but all of those changes improved Kenyon and helped create the strong institution that we study and work within today.

Beyond the Board's specific concerns with unionization, we would like to highlight a disturbing component of the Board's direct response to K-SWOC, which was delivered via email 4 minutes before the Dec. 11 campus-wide communication. In that response, the Board claimed it "obtained a broad range of perspectives, from *students in support of and opposed to a union*, as well as faculty and staff" (emphasis added). Based on our understanding of Section 7 & 8(a)(1) of the NLRA, asking any worker for their opinion on the union and/or asking follow up questions is a violation of the rights workers have. Considering the gravity of the decision made by the committee, we ask the committee to elaborate on how pro- and anti-union students were identified and how follow-up questions were asked. To be clear, this is not a request for the committee to identify any of the students questioned—K-SWOC firmly believes that every student worker deserves a voice and, while K-SWOC represents an overwhelming majority of student workers, that includes workers who are not supportive of unionizing.

In addition to concerns about potential violations of federal labor law, another disappointing aspect of the Board's Dec. 11 letter is that they never brought any of their concerns regarding student worker unionization to student workers as part of a good-faith effort to engage in a productive dialogue on these issues. Had the Board engaged in such a dialogue at any point after forming their Ad-hoc committee in September, K-SWOC members could have provided the responses given in our letter today, which might have changed the way that Board members viewed student worker unionization and its effects on our community. At the very least, student workers and the Board could have talked through these issues, worked out solutions to the concerns raised in the letter, and arrived at reasonable ways of creating together a union that is uniquely suited to Kenyon's values and workers' needs.

Shutting out K-SWOC and the rest of the community from their decision-making process raises the troubling possibility that the Board had decided to oppose student worker unionization far earlier and was simply waiting for an opportune time to inform the community of their position. We sincerely hope that this is not the case and that the Board will now embrace Kenyon's mission to "engage in spirited, informed, and collaborative inquiry" as much as K-SWOC has by engaging in an open process to negotiate the terms for recognizing a union through which student workers can support each other in creating fair and safe workplaces.

Ultimately, K-SWOC will continue its fight to secure a union for all student workers regardless of whether the Board commits to re-engaging in this process in accordance with Kenyon's mission statement and federal law. The Board of Trustees does not get the final word on whether a union will be formed at Kenyon—student workers do.

Sincerely,

The Kenyon Student Worker Organizing Committee (K-SWOC/UE)

--
Kenyon Student Worker Organizing Committee
kswoc.org
IG: @kswoc | FB/Twitter: @KenyonSWOC

CERTIFICATE OF SERVICE

I hereby certify that on this day, October 21, 2021, a true and correct copy of the foregoing Motion to Dismiss was served via e-mail addressed as follows:

Mark Meinster
International Representative United Electrical, Radio and Machine Workers of America
mark.meinster@ueunion.org

/s/ Jacqueline Holmes

FORM NLRB-4701
(9-03)

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

Kenyon College, Employer

and

Kenyon Student Workers, United Electrical, Radio and Machine Workers of America (UE), Petitioner

CASE 08-RC-284759

☒ **REGIONAL DIRECTOR**

☐ **EXECUTIVE SECRETARY**
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ **GENERAL COUNSEL**
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF

Kenyon Student Workers, United Electrical, Radio and Machine Workers of America (UE), Petitioner

IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☒ **REPRESENTATIVE IS AN ATTORNEY**

☒ **IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.**

(REPRESENTATIVE INFORMATION)

NAME: Richard L. Stoper, Jr.

MAILING ADDRESS: Joyce Goldstein & Associates, A Legal Professional Association, 3080 Laurel Road, Cleveland, OH 44120

E-MAIL ADDRESS: rstoper@ggcounsel.com

OFFICE TELEPHONE NUMBER: 216-771-6633

CELL PHONE NUMBER: 330-416-4483 *FAX:* 216-771-7559

SIGNATURE: */s/ Richard L. Stoper, Jr.* *October 26, 2021*

(Please sign in ink.)

DATE:

[1] IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.

FORM NLRB-4701
(9-03)

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

Kenyon College, Employer

and

Kenyon Student Workers, United Electrical, Radio and Machine Workers of America (UE), Petitioner

CASE 08-RC-284759

☒ **REGIONAL DIRECTOR**

☐ **EXECUTIVE SECRETARY**
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ **GENERAL COUNSEL**
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF

Kenyon Student Workers, United Electrical, Radio and Machine Workers of America (UE), Petitioner

IN THE ABOVE-CAPTIONED MATTER.

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(REPRESENTATIVE INFORMATION)

NAME: Joyce Goldstein

MAILING ADDRESS: Joyce Goldstein & Associates, A Legal Professional Association, 3080 Laurel Road, Cleveland, OH 44120

E-MAIL ADDRESS: jgoldstein@ggcounsel.com

OFFICE TELEPHONE NUMBER: 216-771-6633

CELL PHONE NUMBER: 216-509-2542 ***FAX:*** 216-771-7559

SIGNATURE: ***/s/ Joyce Goldstein October 26, 2021***

(Please sign in ink.)

DATE:

[1] IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 8

Kenyon College **Employer** **and** **United Electrical, Radio and Machine Workers of America (UE)** **Petitioner**	**Case 08-RC-284759**

ORDER POSTPONING HEARING INDEFINITELY AND DUE DATES FOR STATEMENT OF POSITION AND RESPONSIVE STATEMENT OF POSITION

On October 18, 2021, the United Electrical, Radio and Machine Workers of America (Union) filed a petition seeking to represent all hourly paid student employees of Kenyon College (Employer).

On October 21, 2021, the Employer filed two Motions in this matter. In its first Motion, the Employer argues that the Region should dismiss the petition, or alternatively stay the petition, because it raises significant jurisdictional and federal privacy issues. In its second motion, the Employer argues that the hearing, along with the due date for filing its Statement of Position and its Initial Lists, should be indefinitely postponed. In its Motions, the Employer argues, among other things, that it risks violating the Family Educational Rights and Privacy Act (FERPA) if it attempts to comply with the Board's Rules and Regulations.

IT IS ORDERED that the hearing set for November 9, 2021 is postponed indefinitely while I consider the parties' positions in this matter. **IT IS FURTHER ORDERED** that the due dates for the Statement of Position and Responsive Statement of Position are postponed indefinitely.[1]

Dated: at Cleveland, Ohio, this 29th day of October, 2021.

IVA Y. CHOE
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 08
1240 E 9TH ST
STE 1695
CLEVELAND, OH 44199-2086

[1] The Employer also requested an indefinite extension of time to post the Notice of Petition for Election (Notice). Given that the Notice simply informs employees that a petition has been filed and provides employees with information about their basic rights under the National Labor Relations Act, I find no reason to extend the time to post the Notice in this matter. My decision on this issue was communicated orally to the parties on October 27, 2021.

FORM NLRB-4069
(1-12)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Kenyon College

Employer

and

Case 08-RC-284759

United Electrical, Radio and Machine Workers of America (UE)

Petitioner

REPORT ON INVESTIGATION OF INTEREST

The undersigned agent of the National Labor Relations Board has investigated the evidence of representation submitted by the Petitioner and/or labor organization*(s)* claiming an interest in the above case. The statistical results of this investigation are set forth below.

1. The following organizations were requested in writing on the indicated dates to submit evidence of representation, if any, but have failed to do so. *If none, so state.*

Name and Affiliation of Labor Organization	Date of Request
None	

Mark either 2a or 2b, as applicable.

a		Designation and payroll information pertaining to the unit claimed appropriate by the labor organization listed in the first column according to a ***Complete____ Spot____*** check of the Employer's payroll for the period ending (Date) _____.
b.	**X**	Although requested, no payroll list submitted.

Name of Union/Petitioner *(Abbreviate)*	Type of Unit Claimed Appropriate	# Employees in Unit	% of names in unit on payroll list among the timely designations submitted by Union/Petitioner OR % of employees in unit based on "No. of Employees in Unit" listed on the face of the petition. Indicate Category 1 (Less than 10%), Category 2 (10-29.9%), or 3 (30% or above). *If interest is based on contract, so state.*
A United Electrical, Radio and Machine Workers of America (UE)	All hourly paid students of the Employer	600	**Union A/Petitioner Category 3** **Designations are current:** **Yes** X **No**
B			**Union B Category** **Designations are current:** **Yes** **No**
C			**Union C Category** **Designations are current:** **Yes** **No**

3. Unit*(s)*, different from those set forth above, the Employer contends appropriate.

Type of Unit Claimed Appropriate	# Employees in Unit	Union A	Union B	Union C
		Category:	Category:	Category:

Date: 10/26/21 *Agent Name:* Daniel Ryan

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

KENYON COLLEGE	)	
	)	
EMPLOYER,	)	
	)	
and	)	**CASE 08-RC-284759**
	)	
KENYON STUDENT WORKERS, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)	)	
	)	
PETITIONER	)	

PETITIONER'S MEMORANDUM IN OPPOSITION TO EMPLOYER'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, STAY RC PETITION AND MOTION FOR INDEFINITE EXTENSION OF TIME TO FILE STATEMENT OF POSITION

JOYCE GOLDSTEIN & ASSOCIATES
A LEGAL PROFESSIONAL ASSOCIATION
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Attorneys for Petitioner Kenyon Student Workers,
United Electrical, Radio and Machine Workers of America (UE)

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INTRODUCTION

On October 18, 2021, the United Electrical, Radio and Machine Workers of America ("the Union" or "Petitioner") filed an RC Petition with the National Labor Relations Board seeking certification of a unit of "[a]ll hourly paid student employees of Kenyon College [the employer]," excluding "[a]ll managerial employees, guards, professional employees and supervisors as defined by the Act, and all other employees." The petition sought an in-person election on November 8 and 9 at the employer. The Region scheduled a hearing for November 9, 2021, with Statements of Position due on November 1 and 4 respectively.

On October 21, 2021, the employer filed a Motion to Dismiss, or, In the Alternative, Stay RC Petition, and Motion for Indefinite Extension of Time to File Statement of Position. On October 28, 2021, the Region postponed the hearing pending resolution of the motions.

The issues raised by the employer's motions are two-fold. First, the employer argues that the Board should not certify the unit because the Board has never exercised jurisdiction over a wall-to-wall bargaining unit of undergraduate student workers. This ignores the fact that the Board and General Counsel have recognized in many cases and General Counsel Memoranda the appropriateness of bargaining units comprised of undergraduate and/or graduate students, and that the determination of whether such a unit is appropriate is best determined after a hearing.

Second, the employer argues that the Board lacks authority to enforce its representation rules implementing the National Labor Relations Act because of allegedly conflicting obligations under the Family Educational Rights and Privacy Act ("FERPA") arising from the employer's wholly voluntary and collateral decision to accept federal funds.

As explained more fully below, nothing in FERPA limits the Board's power to issue orders, hold hearings and elections, and certify bargaining units pursuant to the NLRA. Likewise,

nothing in FERPA prevents the employer from complying with the Board's Rules other than its own unwillingness to do so. The consequences of doing so are speculative, as the employer has not even provided evidence that it has a "policy or practice" of disclosing information that might result in a financial penalty pursuant to FERPA.

In *Trustees of Columbia Univ. in the City of New York & Graduate Workers of Columbia-GWC, UAW,* 364 NLRB No. 90, 2016 WL 4437684, 14, n. 93, (Aug. 23, 2016), the Board held that the rights of workers to organize under the Act cannot be disregarded because it might be easier to apply other statutes if the Board exempted student employees from the coverage of the Act. The employer cannot use its feigned concern for the privacy rights of its students to secure its own finances, and use FERPA as a shield to prevent those same students from exercising their rights under federal labor law. The rights of student employees to organize cannot be held hostage to the funding preferences of a private university.

Nor should the Board twist itself into a pretzel to cater to an employer's speculative concerns about the consequences that complying with federal labor law might have on its funding. The Board has been entrusted by Congress with the authority and duty to investigate petitions and hold hearings, and all employers come before it on an equal footing. Collateral promises made by those employers to private parties or governmental entities, do not trump the rights of employees to organize and the Board's statutory duties to enforce the Nation's labor laws. That responding to a representation petition might impose costs on an employer, financial or otherwise, is no basis for the Board to relinquish its authority over a private employer.

Accordingly, the employer's motions should be denied, and the petition should be set for hearing forthwith.

STATEMENT OF FACTS

The employer has about 1,900 enrolled students, with several hundred student-employees (hereinafter "employees") at 750 bargaining unit positions. ((b) (6), (b) (7)(C) Decl. ¶8, Exhibit 1).[1] Employees may work in one job one year, and another job the next year. However, they continue to be employed by the employer for a substantial period. It is common for employees to work at multiple jobs. A large percentage of the employee population consists of employees who are participating in work-study. Employment is presented as a "work-study award" in a student's financial aid package, but students are given no guarantee of a job. (Id. ¶9).

Employer's Work Policies.

The employer publishes its employment policies on its website.[2] The employer "provides part-time student employment opportunities through the Federal Work-Study Program (FWS) and Kenyon College employment. The main objective of the student employment program is to provide job opportunities for students that enable them to concentrate on studies, yet earn money for educational expenses." (Exhibit A-1 at 5, *Student Work*).

Hiring.

Employees use an electronic job board called "Handshake" to find jobs. The employer advises employees to apply for multiple positions to increase their chance of being hired, and requires documentation that they are eligible to work in the United States. (Id. at 2). Employees are required to fill out forms and submit them to the Office of Student Work to confirm their

[1] According to the employer's website, "[o]ver 800 students work on campus jobs during the academic year and the summer. In dealing with these students, the College must follow federal and state regulations governing employment. Following the procedures outlined in this website will ensure compliance with these regulations." See Exhibit A-4, *Student Work Supervisors,* to (b) (6), (b) (7)(C) Declaration, Exhibit 1.

[2] See https://www.kenyon.edu/academics/career-development/career-development-office/student-work/, and Exhibits A-1 to A-7 attached to (b) (6), (b) (7)(C) Declaration, Exhibit 1.

placement. (Id.).

Compensation.

Employees are paid on a biweekly basis and submit their timesheets online. (Id. at 3-4). Timesheets must be approved by the employee's supervisor. If timesheets are not submitted by the deadline, the employees are not paid. (Id.). The employee must use their User ID and PIN which is not the same as the student's network or email login. (Id. at 4). The online work policies outline the terms and conditions of employment.

> Student employees are not paid for time not worked. Students do not receive paid vacation days, sick days, personal days, holidays, or benefits. If a student is not working during the scheduled time, they must indicate this on the timesheet. Students do not get paid breaks or lunches. All time off should be discussed in advance and approved by the supervisor. Student employees are expected to contact their direct supervisor to report tardiness or absence.

(Id. at 5). Payroll schedules are set forth on the employer's website.[3]

The employer's policies provide that employees are not permitted to work more than 20 hours per week, except during summer months when they can work 40 hours per week. (Id. at 5).

[3] The online Payroll Schedule provides requirements for processing payroll. (Exhibit A-3).

> Student workers must record hours online via the web. When hiring a new student, please follow the job placement instructions found on the Student work website prior to the student's start date. We must also have a completed I-9 form, state and federal tax form and direct deposit form on file for each student worker before their first day of work. (Students who have worked on campus and been paid by the college in the past are already on file. If in doubt, please contact our office.)
>
> In addition, please monitor students working in multiple departments to avoid overtime pay (students working beyond 40 hours in a single week). For overtime purposes, a week will be defined as Monday - Sunday. Please note that students may work a maximum of 20 hours a week when classes are in session, and up to 40 hours a week during break periods (i.e. winter, spring and summer breaks).

> Departments may reduce student hours to comply with Kenyon's policies. Federal work-study award recipients who earn their maximum award amounts in the corresponding academic year will convert from federal work-study payment status to Kenyon employment payment status to meet federal guidelines. Our policy on state unemployment insurance is that student employment status is temporary, does not contain any provisions for fringe benefits or holiday or overtime pay, and is contingent upon available funds.

(Id.).

Employees receive compensation through a three-tiered system. (Exhibit A-2, *Work Classification Guide and Pay Tier Levels,* (b) (6), (b) (7)(C) Decl., Exhibit 1). "Pay grades for student positions were determined jointly by the Student Work Task Force (now disbanded) and the corresponding departments." (Id.). Factors used to determine pay rate include: independent decision-making, previous experience, special skills, training and education and management of people, facilities, property or programs. (Id.). The payment tiers are as follows:

> Grade Level I - Pay Rate: $8.80*/hour or (*Highest prevailing minimum state or federal wage)
>
> Opportunities that require little to no previous experience, education, special skills or training. Students are highly-supervised. Positions require little independent decision-making, and may require handling minimal amounts of money. Tasks may include some physical labor, customer service, answering and transferring telephone calls, faxing, copying, making deliveries, data entry, filing, scheduling, light cleaning, tour guiding, desk/room monitoring, gardening, dining hall assistance, scorekeeping, and assistance with special projects and events.
>
> Grade Level II – Pay Rate: $10.03*/hour (*Increases each January by the rate of inflation)
>
> Opportunities that may require related experience, education, training or special skills. Some completed course work, and special certification in the designated areas may also be required. Student workers are moderately-supervised, and they may participate in independent decision-making. Student workers may be responsible for other people or equipment, and some physical labor and customer service may be required. Types of duties may include supervised instructional activities, technology assistance, athletic program assistance, interviewing, and editing.

> Grade Level III – Pay Rate: $11.30*/hour (*Increases each January by the rate of inflation)
>
> Opportunities that require a high level of special skills, training, independence, and responsibility for other people, property, facilities and projects. Little supervision is required, and students generally work independently. Many of the opportunities in this level require the completion of specific coursework, a strong academic standing and a faculty/staff referral. Types of duties may include system administration, management of programs, people, or facilities and significant independent work and responsibility.

(Id.).

Supervision.

The employer's online employment policies provide guidelines for supervisors. (Exhibit A-4, *Student Work Supervisors,* (b) (6), (b) (7)(C) Decl.). These include policies regarding grievances.

> We believe most situations can be handled within departments between the student and the supervisor. In cases in which a student is uncomfortable talking with the immediate supervisor, alternatives are listed below.
>
> When department structure allows (i.e., the student works for someone who is not senior staff or department chair), the student should discuss the problem with the person one step above the student's supervisor. A student should go through the department hierarchy before taking the problem outside the department. When a student does not have a hierarchy of people to talk with, or when that group of people has been exhausted without a resolution to the problem, the student should contact the Student Employment Office for additional options.

(Id). Further, "[s]tudents, as College employees, are eligible for Workers' Compensation when they are injured on the job," and employees "must report the injury immediately (within 24 hours) to the supervisor." (Id. at 3).

Evaluations.

The employer "strongly encourages supervisors to complete a student worker evaluation on every student worker at least once a semester." (Id. at 4). A sample evaluation form is included on the website. (Exhibit A-5, *Evaluation Form*, (b) (6), (b) (7)(C) Decl.). The employee is

evaluated on "[j]ob knowledge and skills" to make sure the employee "understands responsibilities and duties, and has the level of proficiency to accomplish *work*." (Id. at 2 (emphasis added)). Employees are also evaluated on "Dependability and punctuality," "Written and oral communication skills," "Customer service skills," "Problem-solving/Critical thinking skills," "Technology skills," "Attention to detail," "Leadership/management skills," "Time management," "Initiative" – "asks for more work when assignments are complete," "Confidentiality," and "Creativity." (Id. at 2-3).

The employee completes part of the form and the supervisor completes the rest. The employer suggests that the supervisor meet with employees in private to review the form and "to clarify job expectations" and answer questions." A supervisor should "note improvements whenever possible." (Id. at 1).

Discipline and Termination.

"If a student finds it necessary to leave a campus job, we encourage at least one week's notice. Some departments will require more time, as it is necessary to find and train a qualified person before the resigning student leaves the job. Other positions can remain open for short periods of time, and these supervisors may not require any notice whatsoever." (Exhibit A-4 at 3, *Student Work Supervisors,* (b) (6), (b) (7)(C) Decl.). The online policies provide procedures for discipline and termination.

> Supervisors are encouraged to provide frequent opportunities for meaningful feedback about their student employee's performance with ample opportunity for the student to correct any performance that falls below department standards.
>
> If and when disciplinary problems arise, a supervisor should use the following guidelines, as they provide written documentation in the event of counteraction by the student: 1) Give the student a verbal warning, stating exactly what the unacceptable behavior was, and what needs to be done to correct the problem. Document the conversation. 2) The second time there

> is a problem (it does not have to be the same problem), give the student a written warning (see sample of written warning (https: /www.kenyon.edu/files/resources/samplewrittenwarning-2.doc)) with the same format as the verbal warning. Send a copy of this letter to the Student Employment Office to be included in the student's employment file. 3) The third time there is a problem, you are free to terminate the student's employment with your department (see sample of employment termination letter

(Id.). The written warning form states that "[f]ailure to adhere to the conditions of this written warning, development of new or related problems, and/or continued unsatisfactory performance will lead to more serious corrective action up to and including termination of your employment." (Exhibits A-6 and A-7, (b) (6), (b) (7)(C) Decl.).

> Grounds for disciplinary action include, but are not limited to:
>
> Tardiness Absenteeism Reluctance or failure to meet job requirements as listed in the job description Excessive use of the telephone for personal calls Excessive visiting with friends during working hours.
>
> There are situations which require more severe and immediate action. Grounds for immediate dismissal include, but are not limited to:
>
> Lying on time sheets Theft Being at work under the influence of alcohol and/or illegal substances Use of College equipment or supplies for personal gain Disclosure or use of confidential information for any reason.

(Exhibit A-4 at 5, *Student Work Supervisors*, (b) (6), (b) (7)(C) Decl.).

Types of Employment.

That employees perform different duties does not preclude the Board from determining that the petitioned-for unit is an appropriate unit. The variety of jobs performed by students are set forth below, most of which have no educational component, and particularly, no link to the student's academic major. What the jobs have in common, contrary to the employer's representation, is that the overwhelming majority of jobs are unrelated to any academic program offered by the employer. ((b) (6), (b) (7)(C) Decl. ¶12).

- Athletic Department Workers: About 77 employees work at the Kenyon Athletic Center/Lowery Center as Lifeguards, Equipment Room Maintenance, and Game Day announcers, writing copy for the employer's website or providing general assistance. These jobs have limited or no relationship to any academic program offered by the employer. ([redacted] Decl. ¶¶10-13).

- Community Advisors: About 32 employees work as Community Advisors, living in residence halls and working in the office of Residential Life. Their duties include being on call, patrolling the campus, reporting rules infractions, "crisis management," and handling social events, among other things. The "Community Advisor Job Description" provides that "[t]he Community Advisor position is considered your main out-of-class activity and any competing activities (on/off) campus employment, athletics, organizational membership, internships, etc.) must be discussed in advance by your supervisor." The first listed duty of this position is "upholding and enforcing college policies and regulations." These jobs have limited relationship to any academic program offered by the employer. (Id.; Exhibit C, Job Description).

- Library and Information Services: About 53 employees work in Tech Support, Reference Desk, Circulation Desk, Special Collections, and Digital Kenyon. These jobs are unrelated to any academic program offered by the employer. ([redacted] Decl. ¶¶10-13).

- Admissions: About 120 employees work in Admissions in Ransom Hall, leading tours, hosting prospective students, and helping produce materials for parents and new students. These jobs are unrelated to any academic program offered by the employer. (Id.).

- Quality of Life: About 37 employees work in positions at the Farm, at the Brown Environmental Center, as House Managers, as Sound Techs at the Horn music venue, at the Office of Green Initiatives, and at the Office of Diversity Equity and Inclusion. Contrary to the

employer's motion, the workers at the Farm primarily take care of animals and are not trained in policy. Sustainable farming is not part of the curriculum. Efforts by the Horn Sound Techs to obtain addition training in skilled trades has been rejected by the employer. These jobs are unrelated to any academic program offered by the employer. (Id.).

- Gund Gallery: About 64 employees work at the art gallery maintaining the collection, running educational programs in the neighboring town for school children, as docents, and helping to advertise the gallery. Most of the employees are not art or art history majors and the work is not related to their academic work. (Id.; Exhibit C, Job Description, (b) (6), (b) (7)(C) Decl.).

- Academic Departmental Staff/Other Office Staff: About 63 employees work in individual departments assisting Office Administrators in the various academic departments, doing clerical work, helping creating content to sell the employer's business, and building sets for the drama department. These jobs are unrelated to any academic program offered by the employer. ((b) (6), (b) (7)(C) Decl. ¶¶10-13).

- Note-Takers-SASS: About 54 employees help students with accommodations by taking and sharing notes. (Id.).

- Writing Center and MSSC (STEM Tutoring): About 53 employees work in the Writing Center and about 38 in MSSC. These employees help students with writing papers or completing assignments. Most of these employees are not English majors. (Id.; Exhibit C, Job Description, (b) (6), (b) (7)(C) Decl.).

- Research Assistants: About 4 employees work as research assistants. ((b) (6), (b) (7)(C) Decl. ¶¶10-13).

- STEM Graders: About 42 employees grade quizzes and labs in their respective departments. (Id.).

- Apprentice Teachers: About 89 employees teach small sections of introductory courses, working with a professor to develop teaching plans and activities. These employees are explicitly told that they are employees of the MLL Department and are not students. (Id.).

- Miscellaneous: About 55 employees work in a variety of miscellaneous jobs providing support and infrastructure. This includes stocking shelves, staffing the cash register at the bookstore, sorting mail, working in phone-a-thon, *i.e.*, calling parents and alumni asking for money, or working for the Kenyon Review. In a normal year prior to COVID, employees would wash dishes at the Kenyon Inn, assist professors with scanning, or work at the recycling center. These jobs are unrelated to any academic program offered by the employer. (Id.).

Contrary to the picture painted by the employer that employment is education, not work, the employer's president, Sean M. Decatur admitted to the Chronicle of Higher Education that employment at the employer creates a traditional employer-employee relationship.

> "One of the arguments that's often made, especially around graduate-student unions, is that if it's connected to the educational mission, then, by definition, it isn't employment. *That's not a position I would take*," Decatur said. "There are multiple dimensions to the role of student employment on campus. I don't want to underestimate that it's a job. *There's a traditional employer-employee component to it*."

(Exhibit B at 7, (b) (6), (b) (7)(C) Decl. (emphasis added)).

The evidence at the hearing will establish a factual basis for the appropriateness of the unit. No reason exists to dismiss the petition before the hearing, and, therefore, the employer's motions should be denied.

ARGUMENT

I. THE EMPLOYER'S EMPLOYEES ARE STATUTORY EMPLOYEES, AND THE CASE SHOULD PROCEED TO HEARING.

Contrary to the employer's motion, it is well settled Board law that an employee who

works for a business that happens to be a college or university, and is also a student there, does not lose the protections of the National Labor Relations Act. In *Columbia Univ.,* 364 NLRB No. 90, 2016 WL 4437684 (Aug. 23, 2016), the Board held that student teaching and research assistants are employees under the Act if they meet the Act's broad definition of an employee, which encompasses individuals who meet the common law test for employment.

Whether the employees here are "employees" within the Act is determined by Section 2(3) which provides that "[t]he term 'employee' shall include any employee," 29 U.S.C. §152(3), subject to certain exceptions, none of which apply in this case. The Board in *Columbia University* overruled its prior decision in *Brown University*, noting that the "Board has the statutory authority to treat student assistants as statutory employees, where they perform work, at the direction of the university, for which they are compensated. Statutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach." *Id*., 2016 WL 4437684 at 1.

> The unequivocal policy of the Act, in turn, is to "encourag[e] the practice and procedure of collective bargaining" and to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." Given this policy, coupled with the very broad statutory definitions of both "employee" and "employer," it is appropriate to extend statutory coverage to students working for universities covered by the Act unless there are strong reasons *not* to do so. We are not persuaded by the *Brown University* Board's self-described "fundamental belief that the imposition [sic] of collective bargaining on graduate students would improperly intrude into the educational process and would be inconsistent with the purposes and policies of the Act." This "fundamental belief" is unsupported by legal authority, by empirical evidence, or by the Board's actual experience.

Id. at 2 (emphasis in original). "Thus, we hold today that student assistants who have a common-law employment relationship with their university are statutory employees under the Act." *Id*. In reaching this conclusion, the Board found appropriate a unit which included undergraduate students. *Id*.

Despite the employer's suggestion to the contrary, no different analysis applies because the employees are undergraduates. The Board made clear that the key to "employee" status under the Act is the employer-employee relationship, and not whether the employee is also a student. As the Board explained, "[t]he fundamental error of the *Brown University* Board was to frame the issue of statutory coverage not in terms of the existence of an employment relationship, but rather on whether some other relationship between the employee and the employer is the primary one--a standard neither derived from the statutory text of Section 2(3) nor from the fundamental policy of the Act." *Id*. at 7. Accordingly, that the employees are undergraduates has no relevance to whether they are "employees" under the Act.

A. The Employees in the Petitioned-For Unit Satisfy the Act's Definition of "Employee."

In *Columbia University*, the Board held that student employees "who have a common-law employment relationship with their university are statutory employees under the Act." *Columbia Univ.,* 364 NLRB No. 90, 2016 WL 4437684, 2. The "Supreme Court has endorsed the Board's determination that certain workers were statutory employees where that determination aligned with the common law of agency." *Id*. at 6. "Common-law employment, as noted above, generally requires that the employer have the right to control the employee's work, and that the work be performed in exchange for compensation." *Id*. at 17.

Although the employer does not seriously dispute that the employees are common law employees, evidence from the employer's own online employment policies demonstrates that employees in the petitioned-for unit are common law employees.

- The employer maintains or provides a hiring job board by which employees apply for employment which requires the completion of forms provided to the employer.
- Employees are subject to supervision by other employees of the employer.

- Employees complete timesheets which are subject to approval by their supervisors.
- Employees are only compensated for time worked.
- Employee time off must be approved by supervisors.
- Employees submit their timesheets pursuant to a User ID and PIN which is not the same as the employee's student network or email login
- Employees receive job evaluations by the supervisors in which supervisors evaluate employee "work" and are encouraged to suggest areas for improvement.
- Compensation is based on experience, education, special skills or training.
- Employees are subject to discipline and termination for specified offenses.

The employees perform work for the employer for compensation and are under the direction and control of the employer. Accordingly, the employees satisfy the common law standard, and are statutory employees subject to the Act.[4]

B. Employees in the Petitioned-For Unit Are Statutory Employees Under the Board's Decision in *Columbia University*.

Rather than disputing that the employees are common law employees, the employer seeks to relitigate the issue rejected by the Board in *Columbia University*, *i.e*., that the fact that the an employee is also a student removes the employee from the ambit of Section 2(3), despite the absence of any statutory exclusion.

In *Columbia University*, the Board found that "it is unnecessary to delve into the question of whether the relationship between student assistants and their universities is primarily economic or educational." *Id*. at 18. "[W]e can discern no such policies that speak to

[4] The employer's president admits that the employees are traditional employees. President Decatur rejected the position that "if it's connected to the educational mission, then, by definition, it isn't employment," saying that "[t]hat's not a position I would take." (Exhibit B at 7, (b) (6), (b) (7)(C) Decl.). Decatur also admitted that "[t]here's a traditional employer-employee component to" student employment. (Id.). Despite the dispositive nature of these admissions, the petitioner reserves the right to subpoena President Decatur to testify on this and other issues.

whether a common-law employee should be excluded from the Act because his or her employment relationship co-exists with an educational or other non-economic relationship." *Id*. at 7. "The Board and the courts have repeatedly made clear that the extent of any required 'economic' dimension to an employment relationship is the payment of tangible compensation. Even when such an economic component may seem comparatively slight, relative to other aspects of the relationship between worker and employer, the payment of compensation, in conjunction with the employer's control, suffices to establish an employment relationship for purposes of the Act." *Id.* "In sum, we reject the *Brown* Board's focus on whether student assistants have a 'primarily educational' employment relationship with their universities." *Id*.

> The National Labor Relations Act, as we have repeatedly emphasized, governs only the employee-employer relationship. For deciding the legal and policy issues in this case, then, it is not dispositive that student-teacher relationship involves different interests than the employee-employer relationship; that the educational process is individual, while collective bargaining is focused on the group; and that promoting equality of bargaining power is not an aim of higher education. Even conceded, all these points simply confirm that collective bargaining and education occupy different institutional spheres. In other words, a graduate student may be both a student *and* an employee; a university may be both the student's educator *and* employer.

Id. at 8 (emphasis in original). "That the academic-employment setting poses special issues of its own -- as the Board and the Supreme Court have both recognized -- does not somehow mean that the Act cannot properly be applied there at all." *Id*. Accordingly, to the extent that the employer contends that the employee's role as a student excludes the employee from the protection of the Act, the Board has already rejected this argument.

The employer attempts to distinguish this case from *Columbia University*, claiming that the employees in the petitioned-for unit are "part time, temporary student positions," "perform various part-time roles flexibly and episodically over the course of four years," and do not work every week and every semester. (Motion to Dismiss at 10). This argument was rejected by the

Board in *Columbia University*.

In that case, Columbia argued "that undergraduate and terminal Master's assistants in the petitioned-for unit are 'temporary' in the sense that they are employed for relatively short, finite periods of time, averaging only about two (not necessarily continuous) semesters of work." *Columbia Univ*., 364 NLRB No. 90, 2016 WL 4437684, 24. The Board noted that it has

> made clear that finite tenure alone cannot be a basis on which to deny bargaining rights, because "[i]n many employment relationships, an employee may have a set tenure and, in that sense, may not have an indefinite departure date . . . . To extend the definition of 'temporary employee' to [all] such situations, however, would be to make what was intended to be a limited exception swallow the whole."

Id. The Board found that "undergraduate student assistants' relatively short tenure, within the context of this unit, does not suggest a divergence of interests that would frustrate collective bargaining." *Id*. at 25. The Board explained as follows:

> Here, even the Master's and undergraduate student assistants typically serve more than one semester--and thus their tenure is not so ephemeral as to vitiate their interest in bargaining over terms and conditions of employment. Indeed, a semester at Columbia is not some insignificant or arbitrary period of time spent performing a task, but rather it constitutes a recurring, fundamental unit of the instructional and research operations of the University. And notwithstanding the length of any individual assistant's tenure, the University will continuously employ groups of Master's and undergraduate student assistants to perform research and instructional duties across semesters (and, although the precise composition of these groups will differ from semester to semester, there will typically be some individual student assistants who are carried over from one semester to another). Because the University's employment of Master's and undergraduate student assistants is regularly recurring, with some carryover between semesters, and their individual tenures are neither negligible nor *ad hoc*, we believe that as a group, they, together with the Ph.D. assistants, form a stable unit capable of engaging in meaningful collective bargaining.

Id. See also Univ. of Chicago v. Nat'l Lab. Rels. Bd., 944 F.3d 694, 701 (7th Cir. 2019) ("[t]he fatal flaw in the University's argument is that, under prevailing Board law, short-term student

employees may collectively bargain").[5]

The employer also attempts to avoid the impact of *Columbia University* by speculating that the employees will attempt to bargain over "learning conditions" rather than "working conditions." (Motion to Dismiss at 14). However, speculation over the issues that the parties might address in bargaining is not relevant to a representation petition. The Board, in approving the unit in *Columbia University*, observed that "'[t]here appear to be no major disasters that have arisen because of [graduate-student] unions,' and examples of collective bargaining in practice 'appear to demonstrate that economic and academic issues on campus can indeed be separated.'" *Columbia Univ.*, 2016 WL 4437684, 10. The Board cited scholarship finding that evidence "'from public institutions as well as from NYU during the period it had a graduate student union, suggests that unionization does not result in the sky falling.'" *Id*. at 10 n. 71. The Board also cited CBAs negotiated at public universities as evidence that "parties can and successfully have navigated delicate topics near the intersection of the university's dual role as educator and employer." *Id*. at 11.

> Columbia and its supporting amici suggest that collective-bargaining demands would interfere with academic decisions involving class size, time, length, and location, as well as decisions concerning the formatting of exams. They also worry that disputes over whether bargaining is required for such issues may lead to protracted litigation over the parties' rights and obligations as to a given issue, for example, over the propriety of a university's change in class or exam format, thus burdening the time-sensitive educational process. However, to a large extent, the Board's demarcation of what is a mandatory subject of bargaining for student assistants, and what is not, would ultimately resolve these potential problems. Moreover, there is no good reason to doubt that unions and universities will be

[5] The employer cites *San Francisco Art Institute*, 226 NLRB 1251 (1976). (Motion to Dismiss at 13). However, in *Columbia University*, the Board overruled that case, stating that "[t]o the extent that cases like *San Francisco Art Institute*, 226 NLRB 1251 (1976), suggest that the mere fact of being a *student* in short-term employment with one's school renders one's interests in the employment relationship too 'tenuous,' such cases are incompatible with our holding here today and are overruled." *Columbia University*, 364 NLRB No. 90, 2016 WL 4437684, 24, n. 130 (emphasis in original).

> able to negotiate contract language to delineate mutually satisfactory boundaries of their respective rights and obligations.

Id. The Board also took Columbia and other universities to task for focusing on speculation that problems could arise in bargaining, rather than acknowledging "the possibility of any *benefits* that flow from collective bargaining, such as those envisioned by Congress when it adopted the Act." *Id*. at 13 (emphasis in original). Accordingly, the nature of the issues to be bargained does not preclude certification of the petitioned-for unit.

The employer also invokes a "parade of horribles," claiming that a finding that the employees here are statutory employees "could lead to the irrational conclusion that undergraduate students are 'employees' of their educational institution any time they received financial aid from that institution." (Motion to Dismiss at 11). This hypothetical is not this case where the employees bear all the indicia of traditional common law employment and receive wages for time worked. Accordingly, the employer's speculative hypothetical should not preclude a hearing, election and certification.[6]

C. The Employer's Argument That the Employees' Working Conditions Are Dissimilar to "Private Sector Working Conditions" is Foreclosed By *Columbia University* and Unsupported By the Evidence.

The employer recasts the arguments rejected in *Columbia University* as an argument that the employees are not protected by the Act because their working conditions are not typical of

[6] The employer's concern that "bargaining over student compensation and work hours would necessarily entail bargaining about financial aid itself" has no merit (Motion to Dismiss at 14), in light of the fact that wage rates are currently established by reference to traditional criteria such as the "[h]ighest prevailing minimum state or federal wage." (Exhibit A-2, *Work Classification Guide and Pay Tier Levels*, (b) (6), (b) (7)(C) Decl.). Likewise without merit is the employer's concern that "[n]egotiating discipline rules and any attendant grievance process would be similarly fraught with complications" (Motion to Dismiss at 15), given that the existing grievance and discipline procedure provides for written warnings and traditional grounds for discipline. (Exhibit A-4 at 3-4, *Student Work Supervisors,* (b) (6), (b) (7)(C) Decl.).

private sector employment. This argument is foreclosed by the Board's decision in *Columbia University*, and is unsupported by the evidence.

The employees perform functions like those in the private sector such as lifeguards, copy writers, teachers, research assistants, tutors, game day announcers, equipment room maintenance, campus patrols, tech support, library assistants, tour guides, animal care, gallery assistants, mail room, bookstore, and stocking shelves. Nearly all employees perform work that has no relationship whatsoever to their academic major. ([redacted] Decl. ¶¶10-13).

Further, employees are paid an hourly wage based on their skills and experience; are accountable for their time; are required to submit timesheets or they are not paid; are subject to workers compensation statutes; and are supervised by supervisors who conduct evaluations and have authority to discipline and even terminate their employment. These are the hallmarks of working condition in the private sector.

The employer also suggests that because some cases have found that some students are not "employees" under the Fair Labor Standards Act, the employees here should not be treated as employees under the NLRA. (Motion to Dismiss at 9 n.3). This argument is inconsistent with the fact that the employer currently treats the employees as "employees" pursuant to minimum wage laws, setting their compensation based on the "[h]ighest prevailing minimum state or federal wage." (Exhibit A-2, *Work Classification Guide and Pay Tier Levels*, [redacted] Decl.). The employer's argument is also unsupported by law, as the Board has rejected the FLSA standard for coverage "[b]ecause the FLSA definition of a statutory employee is not tethered to the common law (as the Act's definition is), and because the FLSA reflects policy goals distinct from those of the Act." *Columbia University*, 364 NLRB No. 90, 2016 WL 4437684, 7 n. 49.

Accordingly, the employer's argument that students cannot be statutory employees

because their working conditions may be different than other work places has no merit.

D. The Fact That The Petitioned-For Unit Is of Undergraduate Employees Does Not Remove the Protection of the Act.

Also without merit is the employer's contention that the employees are excluded from the Act because they are *undergraduate* students. Nothing in the Act or current Board law makes this fact relevant. In *Trustees of Grinnell College and Union of Grinnell Student Dining Workers*, Case No. 18-RC-228797 (Region 18, November 5, 2018) (Exhibit 2), the Region directed an election among all student employees where the employer had only undergraduate employees and no graduate programs. The Region rejected Grinnell's argument that the unit should not be certified because it included undergraduate students.

> [T]he Employer further contends that *Columbia University* should not apply to its student workers because they are undergraduate students who experience regular turnover every four years. This argument is unavailing for several reasons. First, the bargaining unit in *Columbia University* actually included undergraduate research assistants in the bargaining unit. Second, the statutory interpretation relied on in *Columbia University* applies with equal force to undergraduate student workers, as the Act does not distinguish between graduate and undergraduate workers. Third, to the extent the Employer argues that the turnover in the proposed unit makes it inappropriate for collective bargaining, the Board in *Columbia University* explicitly rejected this argument, emphasizing that the relatively short tenures in the bargaining unit did not invalidate the unit where this tenure was shared by all student workers. *Id.,* slip op. at 20; *see also University of Vermont*, 223 NLRB 423, 427 (1976). The same result follows here.

Id. at 7.[7]

Likewise, in *University of Chicago and International Brotherhood of Teamsters Local 743*, Case No. 13-RC-198365 (Region 13, May 23, 2017) (Exhibit 3), where the petitioner sought to represent a unit of all hourly paid student employees of the employer's libraries, the Region determined that the unit was appropriate and directed an election among undergraduate

[7] In *Grinnell*, as in this case, the employer submitted "arguments based on expired precedent and largely irrelevant case law." (Grinnell Direction at 7, Exhibit 2).

employees. The Region rejected the employer's argument that 1) the petitioned-for employees are not "employees" under Section 2(3) of the Act; and that 2) a certified collective-bargaining representative would interfere with the predominantly educational nature of the relationship between the petitioned-for employees and the employer. *Id*. at 2. *See also Univ. of Chicago v. Nat'l Lab. Rels. Bd.*, 944 F.3d 694 (7th Cir. 2019) (university's evidence was inadmissible as not sustaining its position that group of students who worked part-time for university was ineligible for collective bargaining).

And, most recently, on October 21, 2021, the Region certified a representative of "[a]ll full-time and regular part-time Tour Guides and Student Fellows employed by" Hamilton College. (Notice of Election, Case No. 03-RC-281779, Exhibit 4 at 2). *See also Subject: Gen. Counsel's Rep. on the Statutory Rts. of Univ. Fac. & Students in the Unfair Lab. Prac. Context*, GC Memorandum17-01 at 14 (Jan. 31, 2017) *(*"*Columbia University* settled that undergraduate research assistants are employees"). GC Memorandum 17-01 also explained that

> [n]on-academic undergraduate work presents a less complicated question than the one that the Board grappled with in *NYU, Brown University*, and *Columbia University* concerning what weight, if any, to give the question of whether the work was 'primarily educational'--an issue which is not present where students work in non-academic positions. Thus, students performing non-academic work who meet the common-law test of performing services for and under the control of universities, in exchange for compensation, fall within the broad ambit of Section 2(3). As such, students performing non-academic university work are clearly covered by the NLRA.

Id.[8]

The employer, in support of its claim that the Act excludes undergraduate employees,

[8] GC Memorandum 17-01 noted that "[o]ther students, typically undergraduates, often work in non-academic positions for their universities during the school year, for instance as maintenance or cafeteria workers, lifeguards, campus tour guides, or administrative assistants in the campus financial aid or alumni affairs offices." *Id*. at 14. GC Memorandum 17-01 was rescinded by GC Memorandum 18-02, but reinstated pursuant to GC Memorandum 21-01.

cites the Board's decision in *Northwestern University*, 362 NLRB 1350 (2015). However, the Board in *Northwestern University* repeatedly emphasized that it was not deciding whether the football players involved were "employees" under the Act, and there is no evidence that the undergraduate status of the players was a factor in the Board declining to recognize the unit. *Northwestern*, 362 NLRB at 1352.[9] More importantly, *Northwestern University* was decided prior to the Board's decision in *Columbia University* finding that a unit including undergraduate employees who were "employees" covered by the Act.

Further, most recently, General Counsel Memorandum 21-08, issued September 29, 2021, opined that the "scholarship football players at issue in *Northwestern University*, and similarly situated Players at Academic Institutions, *are* employees under the Act." *Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act, GC Memorandum 21-08* at 2 (Sept. 29, 2021) (emphasis added).

> [T]he conclusion that such Players at Academic Institutions are employees is supported by the statutory language and policies of the NLRA, as well as the Board's interpretation of the same in *Boston Medical Center Corp.*, and *Columbia University*. The definition of "employee" in Section 2(3) of the NLRA is broadly defined to include "any employee," subject to only a few, enumerated exceptions. *Those exceptions do not include university employees, football players, and students*.

Id. at 2-3 (Sept. 29, 2021) (emphasis added). The Memorandum cited as support Justice Kavanaugh's suggestion that "colleges and student athletes could potentially engage in collective bargaining." *Id*. at 5 citing *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

[9] The Board in *Northwestern University* also noted that "[t]he Board has never before been asked to assert jurisdiction in a case involving college football players, or college athletes of any kind." *Id*. at 1352. In this case, to the contrary, the Board has had occasion over many decades to consider whether students are "employees" protected by the Act, and many units of student employees have been certified, both with and without objection from their employers.

Accordingly, that the unit here is comprised of undergraduate students does not remove the protections of the Act or affect the employees' status as statutory employees.

E. A Wall-to-Wall Unit Is Presumptively Appropriate.

The employer contends that a wall-to-wall unit is so "unprecedented" that the Region should not hold a hearing. (Motion to Dismiss at 23). To the contrary, an employer-wide unit is listed in Section 9(b) of the Act and is presumptively appropriate. Section 9(b) provides that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be *the employer unit*, craft unit, plant unit, or subdivision thereof." 29 U.S.C. §159(b) (emphasis added). "[I]n cases where the petitioner seeks a presumptively appropriate unit--such as the wall-to-wall unit at issue here—'the burden is on the Employer to demonstrate that the interests of a given classification are so disparate from those of other employees that they cannot be represented in the same unit.'" *Blue Sch. Emp. & Loc. 2110, Tech., Off. & Pro. Union, UAW AFL-CIO Petitioner*, No. 02-RC-278139, 2021 WL 4893906, at *1, n. 1 (Oct. 19, 2021) (nurse properly included in unit of school employees).

The employer here has provided no *evidence* rebutting the presumption. Accordingly, the motion to dismiss should be denied.

II. A STAY IS NOT APPROPRIATE TO ALLOW THE EMPLOYER TO SEEK BOARD REVIEW OF THE REGION'S UNIT DETERMINATION.

The employer argues that if the Region does not dismiss the petition without a hearing that the Region should stay any further proceedings to allow the employer to stall and delay an election by seeking Board review. There is no factual or legal basis for a stay.

A. The Board's Decision in *Pratt Institute*, 339 NLRB 971 (2003) Provides No Basis for Stay.

The employer cites *Pratt Institute*, 339 NLRB 971 (2003) in which the Board stayed a representation hearing because the Board had granted review in two other cases which raised similar issues, *Brown University*, Case 1-RC-21368 and *Trustees of Columbia University*, Case 2-RC-22358. *Pratt* provides no basis for a stay in this case, and, in fact, supports denying a stay.

The Board in *Pratt* recognized that "representation cases are to be processed and decided as quickly as possible," that stays of representation hearings should be rarely granted, and that the "rarity of stays bespeaks our strong belief in the expeditious handling of representation cases." *Id.* The Board found that a hearing in the case "would be long and expensive" and that the pending cases under review would provide guidance to the parties at any future hearing. *Id.*

None of these factors are present in this case. There is no basis for finding that the hearing would be long and expensive. As the lengthy motion filed by the employer demonstrates, the employer has already marshalled the facts it believes to be relevant and the Union is prepared to proceed to hearing immediately, even though there are few disputed facts in light of President Decatur's admissions and the employment policies outlined on the employer's website which establish that the employees are common law employees covered by the Act. Further, the employer has already signaled that it will spare no expense in the fight against its employees.

The stay should also be denied because there are no cases pending that would justify a stay. The Board's decision in *Columbia University* establishes a blueprint for recognition of the unit in this case. This is particularly true considering the General Counsel's decision "to maintain the prosecutorial position that student assistants, as well as medical interns and non-academic student employees, are protected by the Act." *GC Memorandum 21-08* at 2 n. 2.

In addition, the Board decided *Pratt* before the amendments to the Board's

Representation Case Procedures which requires that extraordinary relief not be granted unless a party can make a "clear showing that it is necessary under the particular circumstances of the case." 29 C.F.R. § 102.67(j)(2). The employer cannot meet this burden in this case. The Board has denied a stay for this reason in similar circumstances. *The Washington Univ. Emp.*, 210 L.R.R.M. (BNA) ¶1073, 2017 WL 4837739 (N.L.R.B. Oct. 24, 2017). Accordingly, the stay request should be denied.[10]

B. The Employer's Claimed Obligations Pursuant to FERPA Do Not Supersede the Board's Authority and Obligation to Exercise Its Statutory Duty to Investigate and Hold a Hearing, Determine the Appropriateness of the Unit, and Hold an Election.

The employer seeks a stay even though the Board's Rules provide for a prompt hearing on a "date 14 business days from the date of service of the notice," 29 C.F.R. § 102.63(a), and require that the employer file its Statement of Position "at noon 8 business days following the issuance and service of the Notice of Hearing," 29 C.F.R. § 102.63(b)(1). The Rules provide that, among other things, "[t]he Statement of Position shall include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing." 29 C.F.R. § 102.63(b)(1)(i)(c).

The employer argues that the hearing should be stayed *indefinitely* due to a conflict between the Board's power, authority, and duty to enforce the NLRA and obligations that the employer voluntarily assumed under FERPA by deciding to accept federal funds, arguing that

[10] The employer also feigns concern that the purported "rapid turnover" of employees creates a risk that a majority vote now will not reflect the will of the workforce two or three semesters from now. However, it is the employer's insistence, through its filings, on debating well established principles that is causing a delay in the election. The Board should not allow the employer to benefit from its delaying tactics.

there is an "irreconcilable conflict" between the Board's Rules and the employer's financing arrangement. (Motion at 17). However, the Board has a statutory obligation to hold a hearing and has adopted lawful rules to fulfill its obligation to do so. Those rules require that the employer provide certain designated information to the Board, and the employer is able and required to do so. The employer cites no law holding that the Board's powers to enforce the NLRA are superseded by collateral obligations that an employer may have voluntarily assumed under FERPA to finance its operations. Private parties, such as the employer, cannot deprive employees of their rights to organize pursuant to the NLRA by entering into agreements with a federal or state government, or even a private party, to attempt to shield themselves from their obligations under federal labor law.

i. The Board has a mandatory statutory obligation to investigate petitions for representation and hold hearings in furtherance of its investigation.

29 U.S.C. §159(b) provides that "[t]he Board *shall* decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." (Emphasis added). 29 U.S.C. §159(c)(1) further provides that, "in accordance with such regulations as may be prescribed by the Board," the Board "*shall* investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall* provide for an appropriate hearing upon due notice." (Emphasis added). *See also* 29 U.S.C. §159(c)(2) ("[i]n determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision *shall* apply irrespective of the identity of the persons filing the petition") (emphasis added).

"The Board carries the ultimate responsibility under the National Labor Relations Act for

determining the appropriate bargaining unit," *N.L.R.B. v. Am. Printers & Lithographers*, 820 F.2d 878, 881 (7th Cir. 1987), and "enjoys a wide discretion in determining the procedure necessary to insure the fair and free choice of bargaining representatives by employees." *S. S.S. Co. v. N.L.R.B.*, 316 U.S. 31, 37 (1942). The Board lawfully exercised this discretion in adopting Rules which require that the employer's "Statement of Position shall include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing." 29 C.F.R. § 102.63(b)(1)(i)(c).

ii. The employer's choice to accept federal funds on the conditions set forth in FERPA does not affect the Board's statutory authority and duty to hold a hearing in compliance with its Rules.

The employer incorrectly argues that "[u]nder FERPA, Kenyon cannot disclose information included in its students' education records without receiving consent from those students prior to disclosure." (Motion at 17). As demonstrated below, the employer *can* disclose such information, and has a duty under the Board's Rules to do so.

Nothing in FERPA supersedes the Board's authority and duty to enforce the NLRA. FERPA does not impose a generally applicable duty of nondisclosure, nor does it create criminal penalties or a private civil right of action. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). The statute simply places conditions on entities who receive federal funds. Schools are not required to accept federal funds, and schools are not bound by FERPA unless they agree to be so bound.

Further, FERPA on its face does not prohibit disclosure of the information required by the Board's Rules, but only provides a financial penalty to schools who have a "policy or

practice" of improperly releasing records.[11] "By its terms, FERPA does not prohibit the disclosure of any education records." *Knight News, Inc. v. Univ. of Cent. Fla.*, 200 So. 3d 125, 127 (Fifth Dist. 2016). "FERPA is not a law which absolutely prohibits the disclosure of educational records; rather it is a provision which imposes a financial penalty for the unauthorized disclosure of educational records." *Ellis v. Cleveland Mun. Sch. Dist.*, 309 F. Supp. 2d 1019, 1023 (N.D. Ohio 2004). *See Bauer v. Kincaid,* 759 F.Supp. 575, 589 (W.D.Mo.1991) (FERPA does not prohibit disclosure of educational records; it imposes a penalty for the disclosure of educational records).[12]

The speculative nature of the employer's purported concern is demonstrated by the fact that the risk of a financial penalty only applies to a school which has a "policy or practice" of

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[11] 20 U.S.C. §1232g(b)(1) provides in pertinent part:

> No funds shall be made available under any applicable program to any educational agency or institution which has a *policy or practice* of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization, other than to the following . . . .

(Emphasis added). The employer also cites 20 U.S.C. §1232g(b)(2) which is likewise limited to entities which have a "policy or practice" of improperly releasing information. The statute provides:

> No funds shall be made available under any applicable program to any educational agency or institution which has a *policy or practice* of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless--

(Emphasis added).

[12] FERPA is not analogous to privileges such as "the attorney-client privilege, the doctor-patient privilege, or the federal statutory privilege against disclosure of tax returns." *Doe v. Kansas State Univ.*, No. 122,704, 2021 WL 4485784, at *9 (Kan. Ct. App. Oct. 1, 2021). *See also Morton v. Bossier Par. Sch. Bd.*, No. CIV.A. 12-1218, 2014 WL 1814213, at *3 (W.D. La. May 6, 2014).

releasing records without consent. 20 U.S.C. §1232g(b)(1). Section "1232g(b) requires only that the participating institution not have a policy or practice in place that permits the unauthorized release of educational records." *Gundlach v. Reinstein*, 924 F. Supp. 684, 692 (E.D. Pa. 1996), *aff'd,* 114 F.3d 1172 (3d Cir. 1997).

> A careful reading of § 1232g(b) reveals a Congressional intention to impose a mandatory obligation on participating institutions, such that it may not have in place "a policy or practice of permitting the release of education records." §1232g(b). Thus, the requirement placed on the participating institution is not that it must prevent the unauthorized release of education records, as Mr. Gundlach contends, but that it cannot improperly release such records as a matter of policy or practice. The court in *Smith v. Duquesne Univ.,* 612 F.Supp. 72 (W.D.Pa.1985), *aff'd without op.,* 787 F.2d 583 (1986), recognized as much when it concluded that "FERPA was adopted to address *systematic, not individual,* violations of students' privacy and confidentiality rights through unauthorized releases of sensitive educational records." *Id.* at 80 (emphasis added).

Id. (emphasis in original). "A single instance of releasing a record without parental consent (which is all that is alleged here) is not a violation of FERPA." *Com. v. Buccella*, 434 Mass. 473, 483, 751 N.E.2d 373, 382 n. 8 (2001). *See Ellis*, 309 F. Supp. 2d at 1203 ("FERPA was designed to 'address systematic, not individual, violations of students' privacy by unauthorized releases of sensitive information in their educational records.'"); *Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144*, 45 F. Supp. 2d 664, 674 (D. Minn. 1999) ("a solitary violation is insufficient to support a finding that the District has violated FERPA as a matter of policy or practice").[13]

The employer does not allege that it has such a "policy or practice, and there is no factual or legal basis for concluding that the employer's compliance with the Board's reasonable rules would constitute such a "policy or practice." In the absence of a "policy or practice," FERPA is

[13] These decisions are consistent with the U.S. Supreme Court's finding that "FERPA's nondisclosure provisions further speak only in terms of institutional policy and practice, not individual instances of disclosure." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 288 (2002). "Recipient institutions can further avoid termination of funding so long as they 'comply substantially' with the Act's requirements." *Id.*

not implicated, and the employer should be required to comply with the Board's Rules.

Petitioner is not aware of FERPA providing any obstacle to enforcement of the Board's Rules in other cases in which undergraduate students have been found an appropriate unit. Nothing in FERPA prohibits the employer from providing the required information pursuant to the Board's Rules like any other employer, and nothing in FERPA prohibits the Board and Union from receiving such information. The employer won't incur criminal penalties and can't be the subject of a private civil action. The worst that could happen is that the employer might be the subject of a compliance investigation by the Secretary of Education, and might face a financial penalty. But the employer knew this when it signed up for federal funding. It was fully aware of its legal obligations as an employer under federal labor law, and was fully aware of the conditions of its funding. None of this was unknown, or a secret.

The Supreme Court has held that an employer has only itself to blame when it voluntarily acts to subject itself to conflicting obligations. In *W.R. Grace & Co. v. Loc. Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757 (1983), W.R. Grace entered into a conciliation agreement with the EEOC that conflicted with the seniority provisions in its collective bargaining agreement, thereby subjecting itself to arbitration awards pursuant to the CBA. In upholding the awards, the Court noted that

> it is undeniable that the Company was faced with a dilemma: it could follow the conciliation agreement as mandated by the District Court and risk liability under the collective bargaining agreement, or it could follow the bargaining agreement and risk both a contempt citation and Title VII liability. *The dilemma, however, was of the Company's own making. The Company committed itself voluntarily to two conflicting contractual obligations*.

Id. at 767 (emphasis added).

The Court held that the company and the EEOC could not alter the terms of the CBA by entering into a conciliation agreement which conflicted with the CBA because "[p]ermitting such

a result would undermine the federal labor policy." *Id*. at 771. "The Company was cornered by its own actions, and it cannot argue now that liability under the collective bargaining agreement violates public policy." *Id*. at 767.

Similarly, in this case, the employer cannot impair the Board's power and duty to enforce federal labor laws by entering into an agreement to accept federal funds with strings attached which conflict with the Board's Rules. Accordingly, the employer should not be excused from its obligations under federal law by conflicting promises it made to secure federal funding.

Accepting the employer's position would surrender the Board's statutory duty to hold hearings and investigate petitions to the whims of private employers, allowing parties to enter into all sorts of agreements that would impair the Board's ability to exercise its statutory duties. What about the anti-worker billionaire alumnus who donates millions but conditions the donation on the school not providing information to the Board, and requires disgorgement of the donation as a penalty for doing so? Surely in such a circumstance the Board would not allow such an "irreconcilable conflict" to undermine its Rules. This case is no different.

iii. The Board's Rules Do Not Violate FERPA.

The cases cited by the employer do not support its position.

In *Nat'l Fam. Plan. & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826 (D.C. Cir. 2006), cited by employer, an organization which provided family planning services sued the federal government alleging that a condition on federal funding violated the First Amendment and Congress's spending power. In concluding that the plaintiff lacked standing to challenge the amendment, the court cited "the association's complete failure to show that HHS's enforcement mechanism is one that would really burden a grantee that guessed wrong. There is no suggestion in its papers that good-faith conduct violating a grant condition would trigger an immediate

funding cut-off." *Id*. at 829. Likewise, in this case, the employer has not established that it has a "policy or practice" of improperly disclosing student information such that the Department of Education would cut-off its funding for complying with the Board's Rules.

The Court in *Nat'l Fam. Plan. & Reprod. Health Ass'n* also noted that "Plaintiff doesn't point to a single instance in which the government has treated the reassignment of a caregiver who refuses to provide abortion counseling as 'discrimination' against that caregiver, or in which it has questioned a member's funding because of the way the member navigated between the regulations and the conscience provisions." *Id*. Likewise, in this case, the employer points to no case in which the Department of Education has cut-off funding to an employer which complied with the Board's Rules. Accordingly, the case cited by the employer provides no basis for finding that the Board's Rules violate FERPA, and, in fact, the case supports the petitioner's argument that the employer's voluntary acceptance of federal funds does not shield it from the Board's procedures enforcing employee rights under the Act.[14]

As the employer notes, the Board addressed FERPA in its decision in *Columbia University.* The dissent in that case argued that FERPA weighed against permitting student

[14] Other cases cited by the employer are also distinguishable. In *Ohio v. United States Army Corps of Engineers*, 259 F. Supp. 3d 732 (N.D. Ohio 2017), the court found that an Army Corps of Engineers regulation was inconsistent with the statutory directive to the agency. The case did not involve an independent entity like the NLRB, but only the agency's execution of its own mission. The case is not analogous to this case, and, therefore has no application here. Also distinguishable is *United States v. Miami Univ*., 294 F.3d 797, 804 (6th Cir. 2002), cited by the employer, in which the Department of Education filed a lawsuit to enjoin Miami University and The Ohio State University from releasing student disciplinary records to the Chronicle of Higher Education. While the court found that the records in issue were "education records," the case has no application to this case where the Board, unlike a private party like the Chronicle of Higher Education, seeks information necessary to fulfill its statutory mandate to administer the Act. The employer also cites several cases relating to disclosure of education records to private parties during discovery. None of those cases are relevant as this case does not involve a private dispute, but the power and authority of a Congressionally created agency to fulfill its statutory mandate.

employees to organize, but the Board rejected that position. "That application of the Act in some specific respect might require accommodation to another federal law cannot mean that the Board must refrain from applying the Act, at all, to an entire class of statutory employers or statutory employees." *Columbia Univ.*, 364 NLRB No. 90, 2016 WL 4437684, 7 n. 50. The Board refused to find that the Act could not apply because of an employer's FERPA fears. "That an industry or economic sector is governed in certain respects by other federal laws, in addition to being covered by the NLRA, cannot mean that the Board must determine, in the abstract, whether the general policies of those other laws might be better accomplished if the Act did *not* apply, notwithstanding the absence of any exemption from coverage in the statutory text or the legislative history. It is far too late in the day--45 years after the Board's decision in *Cornell University*, supra--to argue that the Act cannot safely be applied to private universities." *Id*. at 14 n. 93 (emphasis in original).

The Board noted that the dissent offered no suggestion regarding how to accommodate the Act "short of not applying our statute at all to student assistants. That alternative, of course, is disfavored, unless a conflict between two federal statutes is truly irreconcilable." *Id*. As discussed above, the statutes are not irreconcilable. FERPA only prohibits a "policy or practice" of improperly disclosing information, not a single disclosure as required by the Board's Rules.

The Board should not allow the employer to browbeat the Board into betraying its duty to administer federal labor laws by bowing to voluntary conditions that the employer accepted in arranging the financing of its operations. Any action other than enforcing its Rules would be a derogation of the Board's statutory duty.

iv. The employer's failure to seek guidance from the U.S. Department of Education requires rejection of the employer's FERPA arguments.

Under FERPA, funds are not cut off for all disclosures. The statute provides that an "action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means." 20 U.S.C. §1232g(f). "[B]efore stopping the flow of federal funding to an educational institution, FERPA requires the Secretary to find not only that the institution has failed to comply with the statutory protocol but also that compliance cannot be secured by voluntary means." *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 69 (1st Cir. 2002).

In *Graduate Teaching Fellows Federation Local 3544, AFT, AFL-CIO v. Oregon University System*, Oregon Employment Relations Board, Case No. UP-18-00 (October 17, 2001), the University refused to provide information to the Union, claiming that FERPA precluded it from doing so. The Board summarized FERPA's enforcement provisions as follows:

> FERPA regulations set forth specific enforcement procedures which allow an institution time and opportunities to correct any existing compliance problems with FERPA obligations. In other words, once a problem is identified, an educational agency or institution is not under the immediate threat of revocation of federal funds. FERPA regulations provide an explicit adjudicatory process for investigating, processing, and reviewing complaints that an institution is not meeting FERPA requirements. *See* 34 CFR, Part 99, Sections 99.60 through 99.67. This enforcement process includes the mandate that if an educational institution determines it cannot comply with FERPA, due to a conflict with State or local law, it *"shall* notify the [Federal Department of Education] within 45 days, giving the text and citation of the conflicting law." (34 CFR, Part 99, Section 99.61, emphasis added.)
>
> The applicable regulations also delineate the obligations of the Office, the agency responsible for investigation, technical advice, and enforcement of FERPA. The Office investigates complaints to determine if an institution has failed to comply with FERPA. It provides notice to the institution of the complaint and an opportunity to submit a written response. The Office reviews the submissions and may permit further submissions by the parties. After its investigation, the Office provides the parties written notice of its

> findings and the basis for its findings. If the Office finds that the educational institution has not complied with FERPA, its notice to the parties: "(l)[i]ncludes a statement of the specific steps that the agency or institution must take to comply; and (2) [p]rovides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily." 34 CFR, Part 99, Section 99.66.
>
> It is only after the completion of this process that the Office may take certain actions to compel compliance if the institution has not voluntarily complied within a reasonable period of time. 34 CFR, Part 99, Section 99.67.

Id. at 11, attached hereto as Exhibit 7.

The Board found that the University engaged in an unfair labor practice by not providing the information to the Union, particularly because the University did not notify the Department of Education or obtain an advisory opinion, and no complaint had been filed with the University or DOE regarding the University's compliance with FERPA. "The FERPA was enacted in 1974. Assuming that the University just discovered certain obligations under that law, that discovery does not constitute a business necessity or a bona fide emergency so as to excuse it from its obligations under the PECBA." *Id*. at 14. The Board further noted that "the University acted without any serious attempt to reconcile potential conflicting legal obligations-and without the findings and conclusions of any formal, adjudicatory process. The University cannot simply pick and choose one legal obligation over another." *Id*. at 14 n. 8.

As demonstrated by the extensive information relating to FERPA on its website, the employer in this case was well aware of FERPA and its options to protect its funding. The employer was also aware of the students' organizing efforts for the past several months. But the employer did nothing, laying in the weeds waiting to use FERPA as a shield to block and frustrate a representation petition. The employer now asks the Board to rescue it by granting exceptions to its Rules and basically deny a petition for representation. The employer's failure to act is a waiver of any argument that it is unable to comply with the Board's Rules.

v. Even if the Board agreed to subjugate its Rules to the employer's voluntary decision to accept federal funds, FERPA permits the employer to produce the required information as "directory information."

Even if the Board were willing to allow the employer to control the Board's hearing procedure through its collateral promises to third parties, the employer admits that FERPA allows the production of basic information in the form of "directory information." (Motion at 18). See 20 U.S.C. §1232g(b)(1) (restricting funds to entities which have "a policy or practice" of releasing education records "other than directory information").

"Directory information" is defined by statute, regulation, and the scope of the employer's annual notification. Federal regulations provide that "[d]irectory information means information contained in an education record of a student *that would not generally be considered harmful or an invasion of privacy if disclosed*." 34 C.F.R. § 99.3 (emphasis added). 20 U.S.C. §1232g(a)(5)(A) provides that "directory information" means "the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student." While the regulations exclude certain information, such as Social Security Numbers and student ID numbers, from the definition of "directory information," the information required by the Board's Rules is not excluded.[15]

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[15] As to "directory information," 34 C.F.R. § 99.3 provides in pertinent part:

> (a) Directory information includes, *but is not limited to*, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams;

The employer erroneously claims that it must provide notice and an opportunity to object when it plans to disclose "directory information." While FERPA provides that the employer "shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time" for a parent to object, 20 U.S.C. §1232g(a)(5)(B), the employer has already given such notice. The employer's website publishes an "Annual FERPA Notification," [16] which provides in pertinent part:

> "Directory information" may be released without the consent of the student. Directory information takes two forms. Public directory information (i.e., name, class year, email address, advisor, majors, minors, concentrations, degree in progress or degree awarded, dates of attendance, date of graduation, honors and awards, high school attended, *and similar information*) is available to the public unless the student expressly prohibits their publication in writing to the Office of the Registrar.

(Annual FERPA Notification at 2, attached hereto as Exhibit 5 (emphasis added)).[17]

> degrees, honors, and awards received; and the most recent educational agency or institution attended.
> (b) Directory information does not include a student's—
> (1) Social security number; or
> (2) Student identification (ID) number, except as provided in paragraph (c) of this definition.

(Emphasis added).

[16] Exhibit 5, attached hereto, found at https://www.kenyon.edu/offices-and-services/registrar/kenyon-college-course-catalog/academic-policies-and-procedures/annual-ferpa-notification/

[17] Any claim by the employer that its notification was insufficient to cover the information required by the Board should be rejected. The employer had the opportunity to include within its notice the information sought by the Board and could even have named the Board as an entity to which it would have provided information. 34 C.F.R. § 99.37(d) ("[i]n its public notice to parents and eligible students in attendance at the agency or institution that is described in paragraph (a) of this section, an educational agency or institution may specify that disclosure of directory information will be limited to specific parties, for specific purposes, or both"). Obviously, the employer did not do so to frustrate the students' opportunity to organize.

In a guidance letter dated July 2002 to the University of Massachusetts, the U.S. Department of Education opined that

> We have advised in the past that a graduate fellow's/assistant's status as a graduate fellow/assistant and his/her teaching assignment may be designated as directory information, should an educational agency or institution so choose. *This information is similar to those types of information that are specified by the statute under the definition of directory information and are of a nature of being common knowledge to those who are in the individual's class or who pass by the class*.

Department of Education Guidance Letter at 2 (emphasis added), Exhibit 6, attached hereto.[18]

The information required by the Board's Rules is "directory information." As the Department of Education has already opined, information like that required by the Board's Rules is similar to information designated in the statute and the Annual FERPA Notification as "directory information." Further, since "directory information" includes the employee's field of study and the employer contends that employment is intertwined with education, the information required by the Board is "directory information," and should be produced.

The students and their parents have already received notification pursuant to the employer's website that such information may be disclosed and that they have a right to object. Whether any students or parents have objected is known only to the employer, but such information can be included in the employer's filing with the Board. Accordingly, since the information required by the Board's Rules is "directory information" and notice and opportunity to object has already been provided, the Board should require production of the information and not stay the hearing in this matter any further.

[18] Exhibit 6 is found at https://studentprivacy.ed.gov/resources/letter-university-massachusetts-relating-teaching-assistants.

vi. The employer erroneously states that it can only comply with the Board Rules pursuant to a judicial order or subpoena.

The employer's claim that it cannot comply with the Board's Rules without a judicial order or subpoena is as specious as its other arguments. The employer cites 20 U.S.C. 1232g(b)(2) as requiring a "judicial order" or subpoena.[19] But the statute does not prohibit disclosure of the information required by the Board without a subpoena. The statute only regulates the circumstances in which funding will be cut off, and says nothing about the employer's obligations to the Board. Accordingly, since the statute does not prohibit production of the required information, but only conditions federal funding, the statute does not prohibit the employer from complying with the Board's Rules.

While the Union's position is that FERPA does not prohibit production of information by the employer pursuant to the Board's Rules, the employer's contention that a Board subpoena would not be "lawful" is over the top. 29 U.S.C. §161(1) provides for the Board to "forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceedings or investigation requested in such application." The employer promotes the circular theory that the Board lacks jurisdiction to issue a subpoena if the employees in this case are not statutory employees. Such a theory, if credited, would

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[19] 20 U.S.C. §1232g(b)(2) provides in pertinent part:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless--
>
> **(B)** except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency, . . .

preclude the Board from issuing subpoenas and investigating any representation petitions, and particularly petitions involving employers who attempt to use FERPA to shield themselves from employee organization.

Further, the employer's position has been rejected by the courts. Even though the Board may ultimately determine that it lacks jurisdiction in a particular case, the Board has authority to issue subpoenas to investigate. To deny the Board the opportunity to obtain the information necessary to investigate the petition would be to deprive it of jurisdiction to determine its own jurisdiction. "[N]o good reason appears why the Board should not make the initial determination of the existence of a question affecting interstate commerce in proceeding under" Section 9(c). *NLRB. v. N. Tr. Co.*, 148 F.2d 24, 27 (7th Cir. 1945). "[T]he initial determination of jurisdiction by the Board may not be enjoined, and obviously this prohibition would become meaningless if judicial examination of the same question were permitted in a subpoena enforcement action." *Id*.

> Section 9(c) specifically authorizes the Board to investigate and certify bargaining agents and § 9(b) empowers it in each case to determine the appropriate unit for purposes of collective bargaining, 29 U.S.C.A. § 159(b), (c). As part of this investigation or as a result thereof, the Board must necessarily determine whether the bank's operations affect commerce within the meaning of § 2(6) and (7) of the Act, 29 U.S.C.A. § 152(6), (7), and whether in fact and in law questions affecting commerce have arisen concerning the representation of employees, as the Union's petition for certification alleges.

Id. at 28-29.

The employer's extreme attack on the Board's subpoena power is meritless, and only serves to highlight the employer's intention to litigate the lawfulness of the subpoena through the federal courts to delay and discourage its students from organizing.[20]

[20] In Case No. 01-RC-186442, involving an election among student employees at Harvard, filings in the case indicate that Harvard asked the Board to issue a subpoena for an employee list and allow Harvard 10 days to produce the list. According to Harvard, this provided Harvard the time to send out "FERPA notices" to the students on the voter list, informing them that the Board

CONCLUSION

Accordingly, Petitioner requests that the Employer's motions be denied.

Respectfully submitted,

JOYCE GOLDSTEIN & ASSOCIATES,
A LEGAL PROFESSIONAL ASSOCIATION

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Attorneys for Petitioner Kenyon Student Workers, United Electrical, Radio and Machine Workers of America (UE)

had subpoenaed information that Harvard was required to produce, thereby allowing them the opportunity to object to disclosure.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2021, a true and correct copy of the foregoing was served via e-mail addressed as follows:

Jacqueline Holmes, jholmes@jonesday.com
Kelly Holt, kholt@jonesday.com
Counsel for Employer Kenyon College

/s/ Richard L. Stoper, Jr.
RICHARD L. STOPER, JR.

Attorney for Petitioner

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

KENYON COLLEGE	)	
	)	
EMPLOYER,	)	
	)	
and	)	**CASE 08-RC-284759**
	)	
KENYON STUDENT WORKERS, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)	)	
	)	
PETITIONER	)	

DECLARATION OF (b) (6), (b) (7)(C)

I, (b) (6), (b) (7)(C), declare and state as follows:

1. I am (b) (6), (b) (7)(C) for United Electrical, Radio, & Machine Workers of America.

2. I attended Kenyon College and graduated from Kenyon College in (b) (6), (b) (7).

3. I have provided assistance to the Kenyon Student Workers Organizing Committee in connection with the petition in the above-referenced case.

4. I make this statement based on my personal knowledge, and based on information gathered by me in connection with my activities in this matter. If called as a witness, I could and would competently testify to the facts contained herein.

5. Attached hereto as Exhibits A-1 through A-7 as follows are true copies of student employment policies published on the Kenyon College website:

A-1 Student Work

A-2 Job Classification Guide With Wage Levels

A-3 Payroll Schedules

A-4 Student Work Supervisors

A-5 Evaluations

A-6 Written Warning Letter

A-7 Termination Letter

6. Attached hereto as Exhibit B is a true copy of an article entitled “Sparked by Covid-19, Undergraduate Organizing May Be the Next Front in Campus Labor Relations” published on September 2, 2020 in The Chronicle of Higher Education.

7. Attached hereto as Exhibit C are true copies of job descriptions for positions held by student employees.

8. There are several hundred student employees at Kenyon College employed in approximately 750 different positions. There is substantial overlap among the job positions, with student employees working more than one job. Employees may work in one job one year, and another job the next year. However, they continue to be employed by the employer for a substantial period.

9. A large percentage of the employee population consists of employees who are participating in work-study. Employment is presented as a “work-study award” in a student’s financial aid package, but students are given no guarantee of a job.

10. The jobs worked by student employees include lifeguard, announcers, equipment room maintenance, copy writer for website, stocking shelves, bookstore, mailroom, phone-a-thon (donation solicitation), Kenyon Review, clerical work for department administrative offices, Gund Gallery, animal care at the Farm, Horn Sound Techs, gardening, House Managers, tour leaders, hosts for prospective students, admissions, Helpline, Circulation Desk, Special Collections, Digital Kenyon, Community Advisors, note takers, research assistants, tutors, and apprentice teachers.

11. Prior to COVID-19, student employees washed dishes at the Kenyon Inn, scanned materials for professors, and worked at the recycling center.

12. The overwhelming majority of the jobs worked by student employees have no relationship to their academic major.

13. I am submitting this declaration in connection with the Petitioner's Memorandum in Opposition to certain motions filed by Kenyon College in this case. I have reviewed the Memorandum in Opposition and state that the factual matters stated therein are true and correct.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November ____, 2021

(b) (6), (b) (7)(C)

_____

Kenyon

Student Work

Student work can provide both financial assistance and valuable work/educational experience.

Note to students: To become eligible for student work, you must first verify your eligibility to work within the United States with the Office of Student Employment. For convenience, you are able to complete this step at any time, even prior to accepting a position. For more information, read *Employment Forms and Eligibility* below.

Current Office of Student Employment Hours

Monday: 8:30 a.m. - 12 p.m. & 1 - 4:30 p.m.
Tuesday: 1 - 4:30 p.m.
Wednesday: Closed
Thursday: Closed
Friday: 8:30 a.m. - 12 p.m. & 1 - 4:30 p.m.

Information for Students & Student Workers

Tips for Finding a Job

Use these resources to maximize your chances of landing a job on campus.

Handshake Tutorials

How to Find Student Employment Jobs in Handshake (https://youtu.be/3kakuHW_QQU)

How to Apply to Student Employment Jobs in Handshake (https://youtu.be/9rMItt0KNbc)

Application Resources

Resume Resources (https://app.joinhandshake.com/articles/16251)

Cover Letter Resources (https://app.joinhandshake.com/articles/21441)

Interviewing Resources (https://app.joinhandshake.com/articles/21443)

Tips

Apply to multiple positions. Some jobs have higher demand than others. Applying to multiple positions increases your chances of landing a position.

Take time to craft a strong resume and thoughtful cover letter. You can ask for virtual feedback from the CDO on your materials prior — even if you are an incoming first-year student! Submit your materials here to request CDO feedback. (https://kenyon.co1.qualtrics.com/jfe/form/SV_eX0E6OR7CKYc2K9)

If you intend to work on campus at some point during your four years at Kenyon, plan to bring the required documentation to prove eligibility to work in the United States. Eligible documents can be found on Page 3 of the I-9 form (https://www.kenyon.edu/files/resources/i-92020exp103122.pdf). Once you present these forms to the Office of Student Employment, you will not need to present them again as long as they do not expire during your time at Kenyon.

It's always a good idea to discuss your job search approach with a member of the Career Development Office counseling staff. You can schedule appointments here (https://app.joinhandshake.com/appointments) if you have an active Handshake account or by emailing cdo@kenyon.edu (mailto:%20cdo@kenyon.edu).

Employment Forms and Eligibility

Eligibility

To be eligible for student work, you must verify your eligibility to work within the United States by presenting original documentation (photocopies and faxed copies of documents are expressly prohibited) required on page 3 of the I-9 form (https://www.kenyon.edu/files/resources/i-92020exp103122.pdf). You can present these to the Office of Student Employment at any time, even prior to accepting a job, and you will not need to present them again so long as the documents do not expire during your time at Kenyon.

International students must obtain a Social Security Card in order to work. The Center for Global Engagement (https://www.kenyon.edu/academics/study-abroad-off-campus-learning/center-for-global-engagement/) assists students in filing the appropriate applications.

Forms

Students will need to fill out the following four forms and turn them in to our office shortly after being hired to confirm their student employment placement. Communicate with your student employment supervisor if you cannot complete these forms within a week of receiving your offer:

I-9 (https://www.kenyon.edu/files/resources/i-92020exp103122.pdf)

Federal W-4 (https://www.irs.gov/pub/irs-pdf/fw4.pdf)

State IT-4 (https://tax.ohio.gov/static/forms/employer_withholding/generic/wth-it4-combined.pdf)

Direct Deposit Form (https://www.kenyon.edu/files/resources/newdirectdepositform2014withstudentid-2.pdf)

Along with these forms, you must present original documentation (photocopies and faxed copies of documents are expressly prohibited) confirming your eligibility to work in the United States, unless you did so previously. (Examples of proper identification may be found on page 3 of the I-9 (https://www.kenyon.edu/files/resources/i-92020exp103122.pdf).) Failure to do so is against federal law and will delay your direct deposit.

Timesheet Instructions

Schedule

Students are paid on a bi-weekly schedule (https://www.kenyon.edu/academics/career-development/career-development-office/on-campus-student-employment/payroll-schedules/).

You may enter your hours daily or wait until the end of the pay period, but please make sure not to hit the "Submit" button in the time sheet program until you are sure that you have entered all your hours for the designated pay period.

Online time sheets must be completed correctly and submitted to the supervisor/employer by the scheduled deadline in order to be processed on time. Time sheets must have the supervisor's approval (or the approval of a designated alternate) to be processed according to the schedule.

Please refer to the payroll schedule to see time sheet deadlines. You must submit your hours by the time sheet submission deadline or you will be locked out of your time sheet and may not get paid for those hours until the following pay period. If you realize you missed the deadline and did not submit your hours, contact your supervisor as soon as possible.

How to Submit

If you are currently on campus, go to your Personal Access Pages (https://mybanner.kenyon.edu/) and log in.

If you are currently off campus, you need to log in through this off-campus access page (http://www1.kenyon.edu/bannerweb).

You must log in using your User ID and PIN. This is not the same as your network or email login. If you have trouble logging in, please contact helpline at 740-427-5700.

On the main menu, click Employee. From the list that appears, choose Time Sheet.

In the "Time Sheet Selection" screen, choose the position you want to enter time for under the My Choice heading, making sure that the Pay Period is the current one for entering time.

Once the time sheet is visible, you can enter time each day by clicking Enter Hours for the relevant day. To enter an amount of time that falls short of or goes over the exact hour, use this chart (https://www.kenyon.edu/files/resources/calculating-compensation-for-time-worked.pdf) to calculate your time.

Please do not change the "SHIFT" number that appears in the box above the "HOURS" box. This must be left as the number one (1).

Click the SAVE button after entering all hours for the day or pay period. Please do not click on the "Submit for Approval" until the end of the pay period.

Once you submit your timesheet for approval you will get a message that your timesheet was submitted successfully. You are done with this timesheet. If you have other timesheets for other jobs, you need to submit them separately.

If you failed to submit your time sheet before the cut-off date:

Three possible scenarios create three different follow-up procedures on your part.

1. You entered all hours but you forgot to submit your time sheet: Email Amanda Moran at moran3@kenyon.edu (mailto:moran3@kenyon.edu) and ask her to submit your time sheet on your behalf.

2. You entered some hours, but not all hours worked, but forgot to submit your time sheet: Email your supervisor that you didn't get all of your hours entered. Send them the hours you worked each day or just the hours that you didn't get listed on the time sheet.

3. You hadn't even started to enter hours on your time sheet yet and the submission date passed, locking you out of the time sheet: You can either email your supervisor the list of hours you worked and ask them to contact Amanda Moran about opening your time sheet so the supervisor can enter your hours for you. Or, you can enter the hours in one lump sum on any date of the current pay period and then list the breakdown of that sum in the comments section of the time sheet.

Student Employment Policies

Student Employment Policies

Kenyon College provides part-time student employment opportunities through the Federal Work-Study Program (FWS) and Kenyon College employment. The main objective of the student employment program is to provide job opportunities for students that enable them to concentrate on studies, yet earn money for educational expenses.

About Employment

Employment on campus is NOT guaranteed for any student. The Office of Student Employment maintains this website to assist students in their search for a position.

Persons eligible for student employment must be currently enrolled at Kenyon College and matriculated.

All non-matriculated persons must apply for non-student employment with the department of Human Resources (https://www.kenyon.edu/directories/offices-services/human-resources/).

Students who have withdrawn (or been withdrawn) lose any campus employment through the Office of Student Employment effective upon withdrawal date.

Academics should take top priority while classes are in session. If a student is placed on conditional enrollment (Kenyon's academic probation status), s/he should consider speaking with your supervisor about taking a break from student employment until satisfactory academic progress is met.

Labor Practices

Student employees are not paid for time not worked. Students do not receive paid vacation days, sick days, personal days, holidays, or benefits. If a student is not working during the scheduled time, they must indicate this on the timesheet. Students do not get paid breaks or lunches. All time off should be discussed in advance and approved by the supervisor. Student employees are expected to contact their direct supervisor to report tardiness or absence.

Student employees generally are not permitted to work at Kenyon more than 20 hours per week during the academic year (40 hours per week during the summer months). Departments may reduce student hours to comply with Kenyon's policies. Federal work-study award recipients who earn their maximum award amounts in the corresponding academic year will convert from federal work-study payment status to Kenyon employment payment status to meet federal guidelines. Our policy on state unemployment insurance is that student employment status is temporary, does not contain any provisions for fringe benefits or holiday or overtime pay, and is contingent upon available funds. Student employees are an exempt class under the employment and training law and do not qualify for unemployment insurance.

Responsible Employees under Title IX

Title IX

All Kenyon College employees have been designated as Responsible Employees under Title IX. As part of this responsibility, each student employee is required to complete this Google form (https://goo.gl/forms/kwdSBUgz54EdpS8v2).

The Civil Rights Office will coordinate with the leadership in the various divisions/departments to schedule an in-person Civil Rights training for the employees of the division/department.

As a Responsible Employee, you are required to report any Title IX violations reported to you or that you personally observe, to the College's civil rights/Title IX coordinator, Samantha Hughes (hughess@kenyon.edu (mailto:hughess@kenyon.edu) or 740-427-5137), Department of Campus Safety (740-427-5000), or your immediate supervisor as soon as possible. Additionally, all employees are required to report instances of suspected child abuse in accordance with the Ohio Law.

Heidi Norris

Student Employment Coordinator

CONTACT

P 740-427-5659

E norrish@kenyon.edu

LOCATION

Chalmers 253

Kenyon

Work Classification Guide and Pay Tier Levels

Pay grades for student positions were determined jointly by the Student Work Task Force (now disbanded) and the corresponding departments. For opportunities added after the initial classification process, pay grades will be determined jointly by the Student Employment Office and the departments, following precedents established by the Student Work Task Force.

Position Evaluation Guideline for Tasks Required

(Characteristics and factors used to determine position grade levels.)

- Independent decision-making
- Previous experience
- Special skills, training and education
- Management (people, facilities, property or programs)

Grade Level I - Pay Rate: $8.80*/hour or (*Highest prevailing minimum state or federal wage)

Opportunities that require little to no previous experience, education, special skills or training. Students are highly-supervised. Positions require little independent decision-making, and may require handling minimal amounts of money. Tasks may include some physical labor, customer service, answering and transferring telephone calls, faxing, copying, making deliveries, data entry, filing, scheduling, light cleaning, tour guiding, desk/room monitoring, gardening, dining hall assistance, scorekeeping, and assistance with special projects and events.

Grade Level II – Pay Rate: $10.03*/hour (*Increases each January by the rate of inflation)

Opportunities that may require related experience, education, training or special skills. Some completed course work, and special certification in the designated areas may also be required. Student workers are moderately-supervised, and they may participate in independent decision-making. Student workers may be responsible for other people or equipment, and some physical labor and customer service may be required. Types of duties may include supervised instructional activities, technology assistance, athletic program assistance, interviewing, and editing.

Grade Level III – Pay Rate: $11.30*/hour (*Increases each January by the rate of inflation)

Opportunities that require a high level of special skills, training, independence, and responsibility for other people, property, facilities and projects. Little supervision is required, and students generally work independently. Many of the opportunities in this level require the completion of specific coursework, a strong academic standing and a faculty/staff referral. Types of duties may include system administration, management of programs, people, or facilities and significant independent work and responsibility.

Kenyon

Payroll Schedules

Student workers must record hours online via the web. When hiring a new student, please follow the job placement instructions found on the Student work website prior to the student's start date. We must also have a completed I-9 form, state and federal tax form and direct deposit form on file for each student worker before their first day of work. (Students who have worked on campus and been paid by the college in the past are already on file. If in doubt, please contact our office.)

In addition, please monitor students working in multiple departments to avoid overtime pay (students working beyond 40 hours in a single week). For overtime purposes, a week will be defined as Monday - Sunday. Please note that students may work a maximum of 20 hours a week when classes are in session, and up to 40 hours a week during break periods (i.e. winter, spring and summer breaks).

Payroll Period	Timesheets Due	Employer Approval Date	Direct Deposit
August 23 - September 5	Monday, September 6	Friday, September 10	Friday, September 17
September 6 - 19	Monday, September 20	Friday, September 24	Friday, October 1
September 20 - October 3	Monday, October 4	Friday, October 8	Friday, October 15
October 4 - 17	Monday, October 18	Friday, October 22	Friday, October 29
October 18 - 31	Monday, November 1	Friday, November 5	Friday, November 12
November 1 - 14	Monday, November 15	Friday, November 19	Friday, November 26
November 15 - 28	Monday, November 29	Friday, December 3	Friday, December 10
November 29 - December 12	Monday, December 13	Friday, December 17	Thursday, December 23
December 13 - 26	Monday, December 27	Friday, December 31	Friday, January 7, 2022
December 27 - January 9	Monday, January 10	Friday, January 14	Friday, January 21
January 10 - 23	Monday, January 24	Friday, January 28	Friday, February 4
January 24 - February 6	Monday, February 7	Friday, February 11	Friday, February 18
February 7 - 20	Monday, February 21	Friday, February 25	Friday, March 4
February 21 - March 6	Monday, March 7	Friday, March 11	Friday, March 18

March 7 - 20	Monday, March 21	Friday, March 25	Friday, April 1
March 21 - April 3	Monday, April 4	Friday, April 8	Friday, April 15

April 4 - 17	Monday, April 18	Friday, April 22	Friday, April 29
April 18 - May 1	Monday, May 2	Friday, May 6	Friday, May 13
May 2 - 14	Monday, May 16	Friday, May 20	Friday, May 27

Kenyon

Address
Gambier, Ohio 43022

Phone
740-427-5000

Kenyon

Student Work Supervisors

Supervisor Information

Over 800 students work on campus jobs during the academic year and the summer. In dealing with these students, the College must follow federal and state regulations governing employment. Following the procedures outlined in this website will ensure compliance with these regulations.

Handshake

All on-campus student employment positions should be posted in Handshake (http://www.joinhandshake.com/). This ensures equity and gives you, as the employer, the chance to meet candidates from across the entire campus.

Visit this Kenyon CDO YouTube playlist (https://www.youtube.com/playlist?list=PL7kpcxh8THUPDr6kCV48BPbl4lqKzvoWK) for tutorials on how to use Handshake to manage your hiring process.

Submitting and Terminating Placements

Access Google Forms

Submitting Placements

On-campus student employers must notify the Student Employment Office by submitting placements through the following Google form (https://docs.google.com/forms/d/e/1FAIpQLSdIDY9pNPo4wrLCSydDHpTqh0aTj_wVOr474p6CqAfJVSBMUg/viewform?c=0&w=1). This form allows you to enter up to 10 students into the same position with the same start and end dates. For more students or varying start and end dates, you will need to fill out more than one form.

Terminating Placements

Do you have a student who will be leaving their position prior to the end date you listed on their original hiring form? Use this Google form (https://docs.google.com/forms/d/e/1FAIpQLSd6OiV3Jvl7jQ_gvIN6tqH4wNepJwEm6OPevA8Jg9g-PHcA5A/viewform) to let me know when their new end date will be. This will ensure that they no longer have access to a timesheet beyond their employment period.

If you plan to create a new position, change pay rate or account numbers, please email Heidi Norris, student employment coordinator, at norrish@kenyon.edu (mailto:norrish@kenyon.edu) or stuemp@kenyon.edu (mailto:stuemp@kenyon.edu), or call Heidi at ext. 5659 with any questions.

Timesheets

How to request a time sheet and approve timesheets.

For a video tutorial on how to review and approve student employment timesheets, visit the Kenyon CDO YouTube playlist (https://www.youtube.com/playlist?list=PL7kpcxh8THUPDr6kCV48BPbl4lqKzvoWK) for employers and click the

video tutorial on reviewing time sheets.

For a written walkthrough, visit approving timesheets (https://www.kenyon.edu/academics/career-development/career-development-office/on-campus-student-employment/campus-employers/how-to-approve-timesheets/).

Payroll

Details and Schedules

Student employees must record hours online via the web. When hiring a new student, please follow the job placement instructions found on the Student Employment website prior to the student's start date. We must also have a completed I-9 form, state and federal tax form and direct deposit form on file for each student worker before their first day of work. (Students who have worked on campus and been paid by the college in the past are already on file. If in doubt, please contact our office.)

In addition, please monitor students working in multiple departments to avoid overtime pay (students working beyond 40 hours in a single week). For overtime purposes, a week will be defined as Monday - Sunday. Please note that international students may work a maximum of 20 hours a week when classes are in session, and up to 40 hours a week during break periods (i.e. winter, spring and summer breaks).

Click here for the current payroll calendar (https://www.kenyon.edu/academics/career-development/career-development-office/on-campus-student-employment/payroll-schedules/).

Student Work Policies

Labor Practices

Student employees are not paid for time not worked. Students do not receive paid vacation days, sick days, personal days, holidays, or benefits. If a student is not working during the scheduled time, they must indicate this on the timesheet. Students do not get paid breaks or lunches. All time off should be discussed in advance and approved by the supervisor. Student employees are expected to contact their direct supervisor to report tardiness or absence.

Student employees generally are not permitted to work at Kenyon more than 20 hours per week during the academic year (40 hours per week during the summer months). Students found working in excess of the above guidelines will be notified. Departments may reduce student hours to comply with Kenyon's policies. Federal Work-study award recipients who earn their maximum award amounts in the corresponding academic year will convert from Federal Work-study payment status to Kenyon employment payment status to meet federal guidelines. Our policy on State Unemployment Insurance is that student employment status is temporary, does not contain any provisions for fringe benefits or holiday or overtime pay, and is contingent upon available funds. Student Employees are an exempt class under the Employment and Training Law and do not qualify for unemployment insurance.

FICA Exemptions

During the academic year when classes are in session, all jobs are FICA exempt; therefore we must follow federal regulations that require all student employees to be currently enrolled for classes during the time that the job takes place. (i.e., working during the Fall and taking classes August through December). FICA exemptions are also possible during the academic year when classes are in break (e.g., Winter Holiday Break and Spring Break), provided that the student employee was eligible to work the last day of classes/exams preceding the break and will be eligible to take classes for the academic period following the break. Summer employment; however, is NOT FICA exempt -- summer earnings will have Social Security and Medicare deducted from the gross pay.

Grievances

We believe most situations can be handled within departments between the student and the supervisor. In cases in which a student is uncomfortable talking with the immediate supervisor, alternatives are listed below.

When department structure allows (i.e., the student works for someone who is not senior staff or department chair), the student should discuss the problem with the person one step above the student's supervisor. A student should go through the department hierarchy before taking the problem outside the department. When a student does not have a hierarchy of people to talk with, or when that group of people has been exhausted without a resolution to the problem, the student should contact the Student Employment Office for additional options.

On-the-Job Injuries

Students, as College employees, are eligible for Workers' Compensation when they are injured on the job. The injured student, or another person acting on that student's behalf, must report the injury immediately (within 24 hours) to the supervisor. Please contact the Office of Human Resources for additional information.

Resignations

If a student finds it necessary to leave a campus job, we encourage at least one week's notice. Some departments will require more time, as it is necessary to find and train a qualified person before the resigning student leaves the job. Other positions can remain open for short periods of time, and these supervisors may not require any notice whatsoever. It is best to communicate in advance whenever possible.

Supervisor Responsibilities

To develop and maintain an accurate and useful job description for each student position. To ensure that students are approved to work at Kenyon BEFORE duties begin. To notify student employment of your hired students in order to generate time sheets. To point students to the student page of responsibilities on the Student Employment website. To provide specific training in areas listed in the job description. To establish a work schedule with each student, preferably in writing. To review special department policies with students, including discipline procedures. To be available and to encourage students to ask questions. To see that timesheets are returned according to established deadlines. (Click on the Payroll Schedule link to review deadlines.)

Disciplinary Procedures

Supervisors are encouraged to provide frequent opportunities for meaningful feedback about their student employee's performance with ample opportunity for the student to correct any performance that falls below department standards.

If and when disciplinary problems arise, a supervisor should use the following guidelines, as they provide written documentation in the event of counteraction by the student: 1) Give the student a verbal warning, stating exactly what the unacceptable behavior was, and what needs to be done to correct the problem. Document the conversation. 2) The second time there is a problem (it does not have to be the same problem), give the student a written warning (see sample of written warning (https://www.kenyon.edu/files/resources/samplewrittenwarning-2.doc)) with the same format as the verbal warning. Send a copy of this letter to the Student Employment Office to be included in the student's employment file. 3) The third time there is a problem, you are free to terminate the student's employment with your department (see sample of employment termination letter (https://www.kenyon.edu/files/resources/sampledismissalletter.doc)). Send a copy of the letter to the Student

(https://www.kenyon.edu/files/resources/sampledismissalletter.doc)). Send a copy of the letter to the Student Employment Office for the student's employment file. Grounds for disciplinary action include, but are not limited to:

Tardiness Absenteeism Reluctance or failure to meet job requirements as listed in the job description Excessive use of the telephone for personal calls Excessive visiting with friends during working hours.

There are situations which require more severe and immediate action. Grounds for immediate dismissal include, but are not limited to:

Lying on time sheets Theft Being at work under the influence of alcohol and/or illegal substances Use of College equipment or supplies for personal gain Disclosure or use of confidential information for any reason.

Behavior meriting disciplinary action could be indicative of a larger issue with which the student may be struggling. A quick call to the Dean of Students Office can set this concern at rest, and may also set in motion a plan to assist the student. This is encouraged whenever a supervisor thinks it could potentially help the student. Moreover, behavior warranting immediate dismissal may also be cause for further disciplinary action. Additional information regarding student disciplinary procedures can be found in the Kenyon College Student Handbook.

Student Worker Evaluation Form

To help foster personal and professional growth in student employees, the Career Development Office strongly encourages supervisors to complete a student worker evaluation on every student worker at least once a semester. Evaluation form (https://documents.kenyon.edu/cdo/stuemp/Evaluation.pdf)

Kenyon College Student Employee Evaluation

To help foster personal and professional growth in student employees, the Career Development Office strongly encourages campus employers to complete a Student Employee Evaluation on every student worker at least once a semester. The evaluation is a great learning tool to let student employees know where they are performing well, and to help them further develop their work skills, abilities and positive work ethics. The employee evaluation should be conducted by the student's immediate supervisor or another staff member who works closely with the student. New student workers should be informed about the evaluation when they are hired.

- It is suggested that each student should complete the student rating/comments sections of the evaluation and return the completed evaluation to their supervisor.* The supervisor will then complete the supervisor rating/comments sections and schedule a meeting with the student to discuss their ratings and goals. (*This process may be reversed at the employer's discretion, and the supervisor may complete the form first if he/she prefers to do so.)

- To conduct the evaluations, supervisors are encouraged to meet with their student employees in a private area to go over them.

- Supervisors should have job descriptions available during the employee evaluations to clarify job expectations and to answer any questions students may have.

- The tone of student evaluations should be positive, encouraging and open.

- Suggestions for improvement in job performance should be done in a constructive and supportive manner.

- Supervisors should stress positive behavior, and note improvements whenever possible.

- Supervisors should discuss the valuable transferable skills student employees are developing through their experience with their corresponding jobs, (i.e. writing, public speaking, supervision, customer service, marketing, problem-solving, research, prioritizing tasks, event planning, etc.) Supervisors are encouraged to refer students to the Career Development Office where career advisors can assist students in highlighting their job skills in their resumes and cover letters.

- Copies of the evaluations should be given to student employees as well as retained by supervisors in secure places within their departments.

Kenyon College Student Employee Evaluation

Name of Student Employee _____ Job Title _____ Semester _____

Name of Supervisor/Employer _____Completed By _____ Date Completed_____

1 = Unsatisfactory (needs improvement)
2 = Satisfactory (meets job expectations)
3 = Good (always meets, occasionally exceeds job expectations)
4 = Excellent (consistently exceeds expectations)
5 = N/A (not applicable)

Student Rating	**Supervisor Rating**	
____	____	**Job knowledge and skills**: understands responsibilities and duties, and has the level of proficiency required to accomplish work.
		Student Comments: _____
		Employer Comments: _____
____	____	**Dependability and punctuality**: arrives at agreed upon time, and can be counted on to complete tasks and fulfill job responsibilities accurately and efficiently.
		Student Comments: _____
		Employer Comments: _____
____	____	**Written and oral communication skills**: communicates effectively in writing, demonstrates knowledge of basic grammar and writing skills; communicates effectively verbally.
		Student Comments: _____
		Employer Comments: _____
____	____	**Customer service skills**: assists customers in a friendly, knowledgeable, professional manner.
		Student Comments: _____
		Employer Comments: _____
____	____	**Problem-solving/critical thinking skills**: evaluates situations objectively and takes appropriate actions or develops solutions to problems.
		Student Comments: _____
		Employer Comments: _____
____	____	**Technology skills**: proficient in using current computer software and other office equipment.
		Student Comments: _____
		Employer Comments: _____
____	____	**Attention to detail**: completes tasks with few errors and in a thorough manner.
		Student Comments: _____
		Employer Comments: _____

____ ____ **Leadership/management skills**: utilizes strong leadership and managements skills by overseeing projects and/or supervising others.

Student Comments: _____

Employer Comments: _____

____ ____ **Time management**: uses time effectively and completes tasks in a timely manner.

Student Comments: _____

Employer Comments: _____

____ ____ **Initiative**: asks for more work when assignments are complete.

Student Comments: _____

Employer Comments: _____

____ ____ **Confidentiality**: respects others' privacy and follows the College's guideline of confidentiality.

Student Comments: _____

Employer Comments: _____

____ ____ **Creativity**: exhibits the ability to create, develop and implement new ideas.

Student Comments: _____

Employer Comments: _____

Are there specific career goals that we can help you develop while working in this position? _____

_____

Are there activities you would like to do or skills you would like to learn? _____

_____

Other student comments: _____

_____

Supervisor Comments: _____

_____

Student Signature_____ Date 10/18/2021

Supervisor/Evaluator Signature _____ Date 10/18/2021

SAMPLE WRITTEN WARNING

TO:

FROM:

DATE:

SUBJECT: **Written Warning**

This written warning is issued for your failure to meet the performance expectations of your position. Specifically, **[clearly state the improper behavior]**. On **[date]**, you received a verbal warning regarding **[state the improper behavior]**.

This is your opportunity to correct your unsatisfactory performance and/or behavior. In order for your performance/behavior to be considered satisfactory, you must achieve and maintain the following performance standards **[describe what the student must do to improve their behavior]**.

Failure to adhere to the conditions of this written warning, development of new or related problems, and/or continued unsatisfactory performance will lead to more serious corrective action up to and including termination of your employment.

Employee

_____	_____	_____
(Print Name)	(Signature)	(Date)

Manager administering Warning:

_____	_____	_____
(Print Name)	(Signature)	(Date)

DISMISSAL FOR JOB PERFORMANCE

Date

Employee Name

Address

Address

Dear _____:

This letter communicates my decision concerning the recommendation for disciplinary action due to your unsatisfactory job performance.

1. On (date), you were given a Written Warning for job performance because each of your last three bi-weekly fiscal reports had been late and contained numerous errors.

The specific performance issues giving rise to the recommendation for disciplinary action are:

2. Since the Written Warning, in which you were informed that further performance problems could lead to your dismissal, you have continued to have additional instances of unsatisfactory performance. These are:

> (a) Failing to submit the proposal for the grant fund tracking system by the second deadline date, (date), which had to be established when you failed to meet the first deadline;
>
> (b) Failing to submit the proposal by the third deadline date, (date), which was set when you missed the second deadline; and

Based on my review of all information available, including prior disciplinary actions, your current unsatisfactory performance, you are being dismissed from your position effective (date).

Sincerely,

(Supervisor's Signature)

THE CHRONICLE OF HIGHER EDUCATION

STUDENT WORKERS

Sparked by Covid-19, Undergraduate Organizing May Be the Next Front in Campus Labor Relations

By Vimal Patel

SEPTEMBER 2, 2020

REBECCA TURNER

Jack Cheston, a senior history major and worker on Kenyon College's farm, sprays produce in a greenhouse on campus last year.

Daniel Napsha washes dishes at a Kenyon College hotel. There's no academic value to it, said Napsha, a senior political-science major. It's not preparing him for work beyond college, and it's not intellectually stimulating. "You're not really exercising anything but your hands," he said. It's labor. Like any other labor.

Across campus, Alasia Destine-DeFreece is learning leadership skills as a resident adviser — or community adviser, as it's called at Kenyon. The modern languages

Meanwhile, Dante Kanter gets to pet goats in his work-study job at the Kenyon farm. But he also lifts heavy equipment, cares for those goats if, say, they're giving birth at 2 a.m., and occasionally deals with dogs pestering the chickens with loud barking. It can be stressful at times

The jobs are different. But those three students and many others are united in the belief that their campus roles are labor, and they should have the right to bargain collectively. On Monday they kicked off a union drive sparked by the uncertainties of student employment — uncertainties that became clear this past spring, when the coronavirus pandemic hit and campuses emptied out, ending many student jobs. If they succeed, their bargaining unit, affiliated with the United Electrical, Radio and Machine Workers of America, will be the first campuswide undergraduate union.

Could undergraduate unionization represent the next front in campus labor relations? Recent developments have opened the door. A 2016 National Labor Relations Board ruling involving Columbia University gave graduate students — and, for the first time ever, undergraduates — the right to form unions at private colleges. In recent years, undergraduates have attempted, sometimes successfully, to unionize Student dining workers at Grinnell College formed a collective-bargaining unit in 2016. Some unions of graduate assistants, including at Harvard and Columbia Universities, now include undergraduate workers.

The effort at Kenyon would unionize all student workers. Organizers want more positions available for students with work-study scholarships, increased mental-health support for student workers, and a greater voice in shaping the college's decisions on workplace issues. Their concerns have been brewing for years, said Destine-DeFreece, but the pandemic has amplified their urgency.

"We're graduating into a world of instability, and we're grasping for unpaid internships," she said. "We're advocating for ourselves in a world in which it increasingly seems like no one's going to advocate for us."

"Whether it's in our college jobs or whether it's in the streets saying we deserve to live," she continued, "we're finding agency, and this is just one way we're doing that."

Students' lives, like everyone's, have become more uncertain during the pandemic. As colleges shifted online, low-income and vulnerable students worried about where they would live. Many colleges, including Kenyon, under pressure from their students, agreed to continue paying student workers for the duration of the spring semester.

The uncertainty caused by the virus has led to a resurgence in labor organizing on campuses, often in broad coalitions. The pandemic has instilled a sense among many campus employees that that their fates are connected, and in several states, unions are organizing "wall to wall" bargaining units that include faculty, staff, and graduate assistants. In the University of North Carolina system, faculty and staff members joined forces in a lawsuit to delay its opening this fall.

Undergraduates have also called for protections. At the University of Virginia, they helped create a union, affiliated with the Communication Workers of America, over the summer "as a direct result of growing dissatisfaction with the university's repeated sidelining of student and worker input when developing its pandemic response," according to a news release. The union wanted the university to abandon its in-person plans for safety reasons.

few days' notice, a time frame many students felt was unfair without more information on what conditions would be like.

Destine-DeFreece said the students had already demonstrated the power of collective action. The community advisers this summer won a $1,000 rate reduction for their rooms and a pay increase of roughly $1.50 an hour. The administration, she said, also gave them more time to decide about working in the fall.

But aren't those accomplishments evidence that union recognition isn't necessary for a productive and responsive relationship with administrators? "This whole process that community advisers went through would have been expedited if we had a union contract in place that would ensure we would be having these conversations," said Destine-DeFreece. "I see the union as a way for us to improve communication. It doesn't have to be necessarily antagonistic."

"We're doing a job that a staff member would be doing. The school is saving a lot of money by having students do this."

Foremost, she wants recognition that she does labor for the college. When Destine-DeFreece was a freshman, her community adviser was a role model who made her feel welcome. It was especially important for her, a Black woman at an institution that struggles for student diversity, to see someone who looked like her. "She was this incredibly smart Black woman," she said. "She would talk for hours throughout the night if we wanted to talk." Nowadays, Destine-DeFreece keeps her in mind as she supports others who are navigating college life for the first time.

On Monday afternoon, the first day of classes, Kenyon students presented President Sean M. Decatur with a letter seeking a path to an undergraduate union.

They want a card-check neutrality agreement. That means they want the administration to allow a union drive outside of a National Labor Relations Board election, and to recognize the bargaining unit if enough student workers simply sign union-authorization cards. It's a strategy designed to avoid litigation with a National Labor Relations Board dominated by Trump appointees, so as not to give the board a chance to overturn the right of students to unionize provided by the Columbia ruling. (Even so, an unusual rule-making process, now underway, might overturn that right.) For now, student organizers' best hope is to pressure their administrations, on a campus-by-campus basis.

Why would a college agree to a card-check neutrality agreement when it doesn't have to?

For one, it would sidestep a protracted battle with its own students and the negative attention that would ensue. It could also be a matter of values: an effort to align a college's rhetoric about labor with its efforts to be inclusive and to protect vulnerable populations. Georgetown University and Brown University have signed such agreements. And the University of Michigan at Ann Arbor recently adopted a policy that calls for neutrality in future organizing.

"Whether or not colleges agree to that depends on how they view collective bargaining and labor rights," said William A. Herbert, executive director of the National Center for the Study of Collective Bargaining in Higher Education and the Professions, at the

Decatur's reaction gave student activists hope. Within a couple of hours of receiving the letter, he told *The Chronicle* that he was not necessarily opposed to an undergraduate union. But given that such a union doesn't exist anywhere in higher education, he said, he couldn't commit to recognizing a wall-to-wall undergraduate bargaining unit or signing a neutrality agreement until he knew more.

"One of the arguments that's often made, especially around graduate-student unions, is that if it's connected to the educational mission, then, by definition, it isn't employment. That's not a position I would take," Decatur said. "There are multiple dimensions to the role of student employment on campus. I don't want to underestimate that it's a job. There's a traditional employer-employee component to it."

But Decatur had questions. He said it's easier to envision the contours of bargaining units of graduate assistants or even student dining workers.

"Here student workers range from community advisers in the dorms, to interns in the art gallery, to graders in academic departments, and those are all very different positions," Decatur said. "I'm thinking of these questions not in the spirit of rejecting the idea out of hand, but in the spirit of wrapping my head around understanding what the path forward is."

We welcome your thoughts and questions about this article. Please email the editors or submit a letter for publication.

STUDENT LIFE | THE WORK FORCE | LEADERSHIP

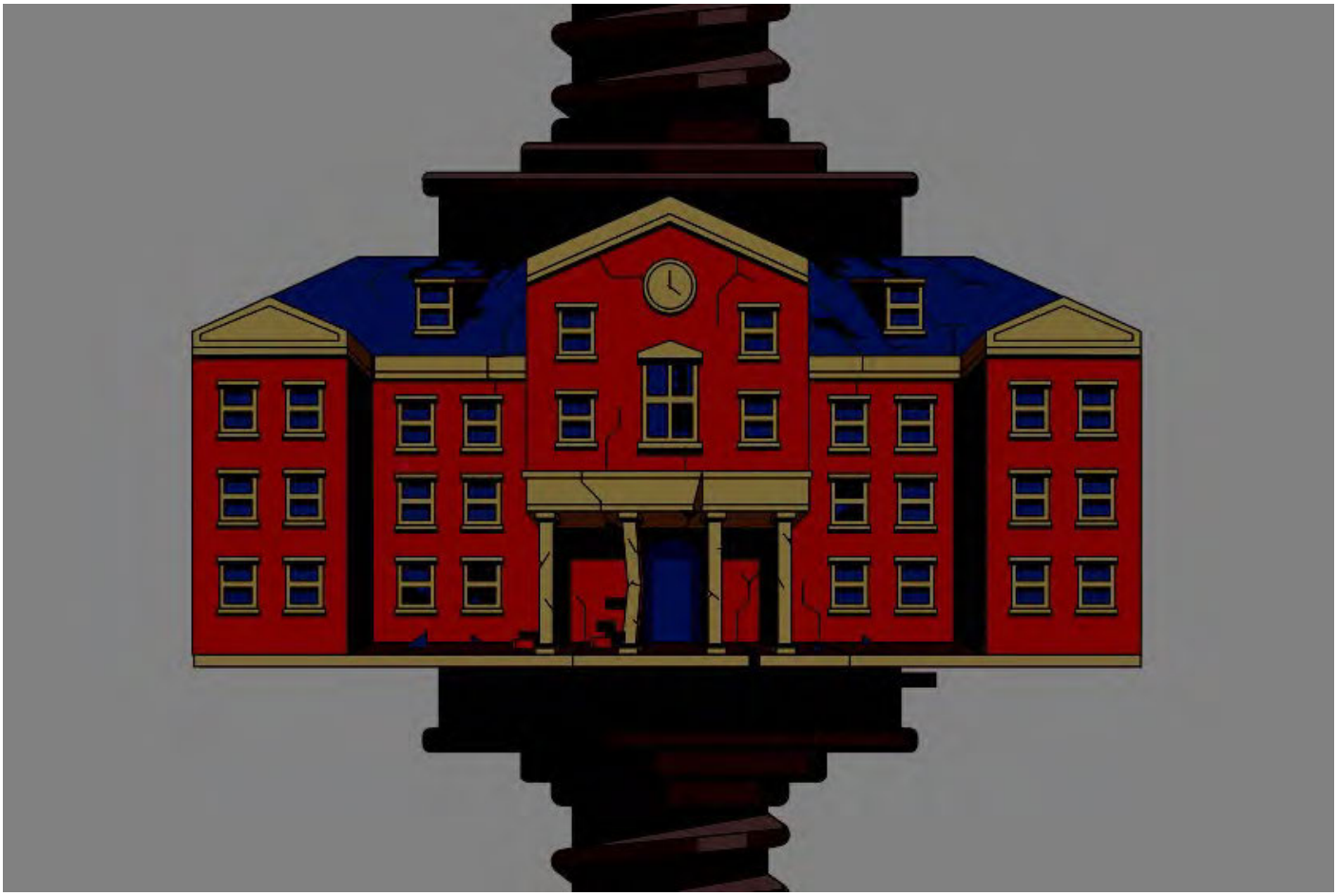
RECOMMENDED READING

'CAN'T GO BACK HOME'

Where Are Most International Students? Stranded Here, Needing Colleges' Help

By Karin Fischer

They face isolation, anxiety, and more — but staff are coming to their rescue.



THE REVIEW

Permanent Budget Cuts Are Coming

The outlook for colleges was looking dim even before the pandemic.

NEWS

Live Coronavirus Updates: Here's the Latest

The fall semester is underway, and Covid-19 is surging. The Chronicle is tracking developments across higher ed here. Read on for daily live updates and information.

Kenyon College

740-427-5142 · reslife@kenyon.edu
www.kenyon.edu/reslife

COMMUNITY ADVISOR JOB DESCRIPTION

The Community Advisor is responsible for upholding the mission and values of Kenyon College, implementing the goals of the Residential Life program, and working to develop a community environment on their floor(s). Community advisors are responsible for upholding and enforcing college policies and regulations, helping to maintain a safe environment, building a residential community through programming, and developing an atmosphere conducive to learning. Holding a Community Advisor position on campus is a highly valued leadership opportunity. This role puts you in a position where you have the ability to influence, inspire and educate your fellow students in such a meaningful way. It is expected that the Community Advisor will work an average of 18 hours per week. This time will be both structured and unstructured. A summary of the responsibilities are listed below.

Summary of Responsibilities

- ***Student and Community Interaction and Development*:** A central tenant of the CA position is that of positive community.
  - Establish, encourage, and maintain positive interpersonal relationships with and among their residents and also establish and maintain a positive living environment using the department's community development model.
  - Promote a sense of unity and identity within the floor, hall, and College by completing floor bulletin boards and door decorations as determined by your supervisor.
  - Show respect and sensitivity toward people with varying lifestyles/backgrounds/differences.
  - Work with residents to establish and maintain an atmosphere conducive to the academic mission of Kenyon
  - Plan and implement programs that are consistent with the requirements and expectations of the programming model of the Office of Residence Life.
  - Encourage a high degree of participation by residents in hall/floor activities.
  - Be a source of information to residents by posting important information and conducting floor meetings as needed.
  - If selected and placed in a first year area, CAs will support Orientation and ongoing First Year Experience Efforts.
  - If selected and placed in upper class areas where Theme and Division Housing is present, CAs will support those programming efforts.

- ***Duty, Student Conduct, and Crisis Management:*** The safety of our residential areas is the most important tenet of the CA Position.
  - Serve as a positive role model for safe and positive behavior, and personally adhere to all regulations regarding College and Housing Residential Life Policies. Be familiar with the Student Handbook policies and procedures.
  - The CA position requires that CAs serve on the duty rotation in their residential area each semester. Being on duty requires CAs to monitor the physical state and emotional climate of their residential area, confront inappropriate/negative behavior in a constructive manner, and promptly respond to emergency situations while following related duty and crisis protocols.
  - CAs also follow up with residents, staff, and a supervisor promptly regarding duty situations and resident behavior.
  - CAs serve as mandatory reporters for Title IX violations.

- ***Administrative Responsibilities and Staff Collaboration*:** The Community Advisor position requires that various administrative tasks be completed on a regular basis. These tasks include, but are not limited to:
  - Complete all required forms per the programming model (proposal, funding request, reflection, etc).
  - Attend CA Trainings and complete assigned College opening and closing duties.
  - Attend weekly staff meetings and bi-weekly 1:1's with supervisor and monthly Residential Life Department Team Meetings.
  - Check and respond to email, voicemails, and other messages within 24 hours.
  - Check the staff mailbox three times a week. Hang up and take down necessary posters.

- CAs are expected to be a positive and productive member of a staff team and have a willingness to support other staff members.
- Must be able to receive feedback and incorporate feedback into job performance from HRL staff and supervisors.
- Additional job responsibilities, as needed.

Minimum Qualifications

- Sustained Grade Point Average requirement of at least 2.50. GPAs of candidates will be reviewed in January and after the spring semester. CAs also should enroll in fewer than 2.5 academic credit units for their first semester in the position.
- Good standing with the Division of Student Affairs. All candidates' conduct history will be reviewed and taken under consideration.
    - During the course of the CA application process, prior to the selection of a student for a CA position, if that student is accused - whether or not an investigation is conducted - of or found responsible for violations of College policies, including specifically, Kenyon College's Sexual Misconduct Policy, Residence Life reserves the right to consider such allegations or findings and act upon them as it reviews the students candidacy for the CA position. Residential Life and the CA agree and acknowledge that the CA role is a special one in the Kenyon community that may require special measures to avoid even the appearance of impropriety.
- Availability to work an average of eighteen hours per week.
- Availability for a one hour weekly meeting. This will serve as the designated time for staff meetings and in-services.
- Able and willing to help with and respond to situations as they arise.
- Ability to maintain strict privacy of information including, but not limited to, student interactions/conduct, conversations with professional staff, administrative documentation, etc.
- Sensitivity to and interest in issues of diversity.
- Strong interest in working with and mentoring students.

Important Notes

- **The Community Advisor position is considered your main out-of-class activity and any competing activities (on/off campus employment, athletics, organizational membership, internships, etc.) must be discussed in advance by your supervisor.**
- If at any time, any outside on/off campus commitment becomes a detriment to the CA responsibilities, especially availability and visibility on the floor and in the building, such commitments need to be reevaluated in consultation with your supervisor and/or Director of Residential Life and may be decreased or discontinued. **(Approval is based on one semester and can be reviewed at any time.)**
- Due to issues of privacy/confidentiality issues, a CA may not serve as a Sexual Misconduct Advisor (SMA), Peer Counselor (PC), or Beer and Sex advisor (BSA).
- All CAs are required and expected to attend all trainings and in-services throughout the term of their employment. Trainings are designed to ensure each CA is equipped with all necessary tools to be an effective community leader. Some trainings will deal with issues related to sexual assault, mental health, suicidal ideation, etc.

Compensation

- CAs will receive $11.30/hour worked. CAs will be paid 18 hours/week (average hours worked each week) during the academic year (15 weeks each semester) and hourly other weeks (i.e. training periods, break duty, etc.). Given that a single room is required for the CA position, all CAs will be billed the CA staff room rate, the cost of a double occupancy room.

Accommodation

- The Office of Residential Life can provide reasonable accommodations to qualified individuals with disabilities who are able to fulfill the essential duties of the position.
    - The ADA defines "reasonable accommodation" as a change or adjustment to a job or work environment that allows a qualified individual with a disability to satisfactorily perform the essential functions of a particular job, and does not cause an undue hardship for the employer.

Writing Center policies and procedures for all staff members, Fall 2021

Your job as a writing consultant is to engage other students in talking about writing. Accordingly, all conferences, including online ones, must be set up for conversation. Using a combination of Google Meet and Google Docs is recommended.

The writing center space in Chalmers library is always open when the library is open. If you or your writer would like more privacy, you can reserve one of the small group study rooms.

Enter each conference in the writing center log. Use the ipad in the writing center or fill out and submit the consultation summary form:
https://docs.google.com/forms/d/e/1FAIpQLScrTBY7Ejdwgf-YU6gLNVxFVutgZwcqYGXol1w2vfiKC2E3yA/viewform?c=0&w=1
If the log is not working, you should *immediately* contact Evan Wagner or Davida Harris.

Update the shared google doc "Writing Liaison/Professor pairs for Fall 2021" as you talk to professors and get their approval for working with a class:

Any writing consultant can also work as a writing liaison, by appointment only, in addition to any on-call/walk-in shifts. As a writing liaison, you can schedule appointments with students in "your" class by email or using google calendar. If you don't mind putting your own work aside when a writer comes by asking for help, you can schedule an in-person "office hour" in one of the small group study rooms in Chalmers, but the hours that go on your time sheet are the actual hours you meet with students, *not* the time you spend waiting to see if writers come by.

You may find that you're meeting with quite a few writers who need an *initial* consultation. We can't always help them "fix" everything in their draft during one half-hour conference, but we can help them prioritize and get started. Try to end your conference by asking when they can come back.

Encourage reading out loud. Your purpose is to start a discussion about the writing as soon as possible; try not to read more than one paragraph silently to yourself before starting to talk about it. You can start by looking at the introduction and conclusion, examining the thesis, or discussing one paragraph of evidence.

Writers do not need to have a draft in order to consult you; you can talk about ideas for getting started. If a writer tries to sit idly by while you read, engage with them by asking them to read out loud or take notes while you talk.

For each conference: set an agenda, begin with a compliment, respond as a reader.

Each staff member should develop his or her own method for breaking the ice with writers but be careful if your method includes commiserating about how much work there is to do at that point in the semester as you run the risk of making the writer feel that they are bothering you.

Please familiarize yourself with the Writing Center website. You can also follow the Kenyon Writing Center Instagram, Twitter, and Kenyon College Writing Center Facebook page.

If you have questions about your time sheet, contact Heidi Norris, student employment coordinator (NorrisH).

For writing consultants on the walk-in/on-call schedule:
If you are on the walk-in/on-call schedule, you are responsible for your assigned shift. Get a sub if you won't be there; this is done by sending a message to the Writing Center Group list *at least four hours before your shift begins* and verifying that you've gotten a positive response.

If you are working during walk-in/on-call hours, you should be willing and able to help any writer with a paper for any discipline. Although you are discussing the writing, rather than course content, you can use "Who Works When" on the Writing Center pages of the Kenyon website to refer a writer who wants a second conference to discuss WID* issues or a consultation on the writing of senior comps.

If you are asked to consult about writing for a class you are currently taking during walk-in or on-call hours you can do it, but suggest that the writer might also want another point of view.

"Kindness Hours:" You can meet once during the semester with any student writer by appointment. The purpose is to bring in writers who ask you for help in your residence hall or when you're trying to study.

For **proposal/resume** writers, **ESL** writers, writers with a **disability**, or **creative** writers you can make an appointment if the writer is unable to meet during your on-call hours. This can be done as often as you are asked. For ESL writers, you can also recommend that the student email for an initial consultation with the Writing Center Director.

Kenyon professors are sometimes concerned that their students are "unduly comforted" during walk-in conferences. To help avoid this, ask for (or look up online) the assignment sheet. Also, see the guides to writing assignments and rubrics for particular professors and classes, available

in the writing center. ((b) (6), (b) (7)(C) and I are asking for your help to get more of this online, on the writing center website.)

Acquaint yourself with the research and reference desk hours and refer student writers who need specialized citation guides. Be aware that every major/program/concentration has its own research guide, prepared by a subject librarian. You should be able to recommend CONSORT, JSTOR, and Academic Search Complete and show students how to use RefWorks, which helps a writer keep track of citations and format basic bibliographies.

For some writers, you may need to recommend the Student Accessibility and Support Services office, which offers access to free assistive technology, including graphic organizers, text to speech and voice dictation software, and screen readers.

The Writing Center is closed during Kenyon breaks and opens on Sunday evening after breaks. Walk-in hours will begin on Sunday, September 5 at 7 pm. Walk-in hours continue until the first reading day at the end of each semester.

For anyone working as a writing liaison:
Writing Liaisons should meet writers by appointment, either online or in Chalmers Library, and record the conference in the log.

It's up to you how you make appointments with the writers in "your" class. If a student makes an in-person appointment with you but doesn't show up, you can be paid for up to 15 minutes of waiting.

You should know what the specific writing assignments are for the class and when they will be due. In addition, it can be helpful to ask the professor you're working with if there are any issues likely to come up in the student writing for a particular assignment, and if there are any questions helpful for guiding writers to do their best work in the discipline. You are paid for the time you spend consulting with the professor for your liaison job.

Generally, your major focus as a liaison should be one-on-one meetings. Occasionally, though, you may want to hold a brainstorming session on the day after an assignment is handed out or organize a workshop for peer editing on drafts.

After your initial meeting with the professor, email or visit the professor during office hours at least once before mid-term and once after, to discuss how the writing assignments are working for the students, whether any of the writing for the class is improving, how your liaison conferences are going, etc.

Ask the professor you work with to stress in class the usefulness of regular writing conferences for all members of the course (not just the few who have “problems” with writing).

Writing Liaisons are not course content tutors; you should focus on helping students in the class think about ways to improve their writing.

You cannot work as a writing liaison for a class you are currently taking.

For those working as liaisons only:
A few students work in a liaison-only position at the request of a professor for one specific class for the duration of one semester.
These students are required to read and take the quiz:
https://docs.google.com/forms/d/e/1FAIpQLScuX_yvu6m-LwP29Z9qwro4npJWwfaZX7Mp3vhGlg22h_6oiQ/viewform

*WID stands for “Writing In the Disciplines”

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18

TRUSTEES OF GRINNELL COLLEGE **Employer** **and** **UNION OF GRINNELL STUDENT DINING WORKERS** **Petitioner**	**Case 18-RC-228797**

DECISION AND DIRECTION OF ELECTION

Petitioner filed a petition on October 9, 2018, seeking a unit of all student employment positions; excluding positions in dining services, and all supervisors and guards, as defined in the Act. The petition sought to add this proposed unit to the existing bargaining unit of student workers in the dining services department. During the hearing, the Petitioner amended its proposed unit by stating it was seeking to exclude student interns who work off campus, service learning work study participants, mentored advanced project (MAPs) participants, and non-student temporary workers. The Employer maintains that the unit sought by Petitioner is not appropriate because the student workers are not employees under Section 2(3) of the Act and the petitioned-for unit does not possess a community of interest. Petitioner and the Employer agree that the unit should exclude student interns who work off campus and non-student temporary workers; the parties are in disagreement over all other positions within the petitioned-for unit.

A hearing officer of the Board held a hearing in this matter and the parties orally argued their respective positions prior to the close of the hearing.[1] As explained below, based on the record and relevant Board law, I find that the student workers are employees under Section 2(3) of the Act and that the unit sought by Petitioner is appropriate.

STATEMENT OF FACTS

Overview of the Employer's Business and Structure

The Employer in this matter operates a liberal-arts college located at 1115 8th Avenue in in Grinnell Iowa. The college has an undergraduate enrollment of approximately 1500 students and does not offer any graduate level programs. The college was founded in about 1846 and has remained in operation since that date.

The record is somewhat unclear regarding the overall structure of the Employer's administration. The college administration is headed by a president, who has an unknown number of vice-presidents and deans reporting to him. A number of these positions are relevant

[1] Both parties declined the option of filing post-hearing briefs.

to the issue of student employment at the college. The Assistant Vice President of Enrollment and Financial Aid coordinates student employment with the financial aid budget and regulatory requirements for the college. The associate dean in the Career, Life, and Services office (CLS) administers the college's service learning work study positions, while student research positions are coordinated, in part, through a faculty student research coordinator.

The Employer also maintains a centralized human resources position dedicated to issues related to student employment. This position is called the Human Resources Training and Student Employment Coordinator. This position is responsible for training faculty and staff regarding student employment; assisting supervisors with the process of hiring and firing of student employees; and ensuring that appropriate employment regulations are followed for student employees.

Student Employment Overview

The record reveals that there are approximately 900 student workers, plus those student workers who are employed in the dining service department, working at Grinnell at any given time,. These student workers work in a wide variety of positions for the Employer; a full listing of these positions can be found in Employer Exhibit L containing all student worker job descriptions. These positions include both work that is done on campus and work done away from the campus. The Union, however, based on positions it took on the record, seeks only to represent those employees who are employed on campus.

The record contains little, if any, detailed evidence regarding the day-to-day duties of the student workers across the various positions in the petitioned-for unit. The Employer submitted hundreds of pages of job descriptions for various positions at the college. The position descriptions are based on a standardized template that is created by the Human Resources Training and Student Employment Coordinator. In addition to creating a single template to be used in creating job descriptions across campus, the Human Resources Training and Student Employment Coordinator provides advice on what to include in job descriptions and is provided with the final job description. These job descriptions outline, among other items, basic position descriptions; qualifications and professional development; schedule and location of work; and physical and cognitive requirements for the positions. The qualifications and job duties for many of these positions vary widely; they were, however, supported by little, if any, testimony regarding terms and conditions of employment for any of the positions.

The Employer broadly contends that positions can be categorized into educational and labor work, as seen in Employer Exhibit A, page 24. Approximately seventy-eight percent of student workers are involved in educational work, which include academic support; classroom support; research; residential; learning/leadership; and career-oriented positions. The other twenty-two percent of students work in labor positions, which involve dining; lifeguarding; mail service; facilities; and "other" positions. Based on the job descriptions discussed above, these positions are further broken down into numerous departments at the college.

Across all student employment positions, the Employer maintains a standardized student employment handbook. This handbook governs many aspects of student employment. Amongst other policies, the handbook indicates that students can find work through a centralized electronic job board called "Handshake." The handbook further indicates how employees are expected to keep track of time and when they are paid (specifically, the 12th and 27th of each month). As pointed out by the Employer, however, the handbook also clearly states that a primary goal of student employment is to further the educational experience of the students.[2]

In addition to this standardized handbook, certain classifications also maintain their own specific handbooks. These include handbooks covering the service learning work study program (discussed in more detail below); the information technology department; peer educators; and library staff.[3] These handbooks contain both general policies and policies that are specific to certain areas (for example, an equipment return policy for IT student workers and requirements for outside partners for the service learning work study program). The record is unclear what other positions at the college maintain separate handbooks.

The record further demonstrates that many student workers hold more than one position at a time, as indicated by Employer Exhibit B. Based on the limited testimony of witnesses, it also appears that employees frequently will switch their positions while attending Grinnell (although it is unclear from the record exactly what percentage of student workers change jobs during their tenure with Grinnell).

The student workers on campus form an important part of the overall operations of the college. As stated in the Employer's standardized employment handbook, and admitted to by the Employer's Human Resources Training and Student Employment Coordinator, student workers "play a critical role in the operations of the college [and] [d]epartments on campus rely on this workforce to accomplish a substantial portion of the work necessary for daily operations." The record is unclear, however, to what extent, if any, student workers in various positions interact with one another on a daily basis.

Day-to-day supervision of student employees is apparently handled within each department. It is unclear, with the exception of student research positions, the specific level of supervision provided within most departments. However, for student research positions which are supervised by faculty, the record reveals that the supervising faculty has the independent authority to hire student research assistants within an allocated budget, and also the authority to fire these research assistants. Outside of this specific example, the Employer, through its Human

[2] Beyond the general *student employment* handbook, the Employer also maintains a standard student handbook that applies to all students at the college. This student handbook contains a limited section related to employment, which states that students must be in good conduct and academic standing for certain leadership and safety-related positions.

[3] The record also includes, as a rejected exhibit, an "Internship Orientation Student Handbook." As discussed above, the parties stipulated that the students covered under this handbook were excluded from the petitioned-for unit. As such, I affirm that this exhibit was properly excluded on relevance grounds.

Resources Training and Student Employment Coordinator, retains central oversight in creating positions, terminating positions, and determining compensation levels.

All student workers are paid based off the same campus-wide wage scale, which is divided into five categories. Based on the Employer's wage matrix, the vast majority of the positions are paid on an hourly wage basis, although a handful of the positions listed in the matrix are salaried positions. The record is unclear the exact range of pay for positions in the proposed unit, although student workers who did testify stated that they were paid anywhere from approximately nine to twelve dollars an hour.

The source of student wages also varies across positions. The Employer spends about two million dollars annually on student wages, approximately two hundred thousand of which comes from federal funding. Certain positions are partially funded through federal student aid. Other positions which have a religious component are prohibited from being funded through federal aid. Students, however, are not generally made aware of whether their work is funded in part by federal aid, and there is no distinction in the level of compensation between employees who receive federal aid and those who do not.

The Employer caps the number of hours that students are allowed to work while class is in session at twenty hours per week, and forty hours a week at times when class is not in session. These caps apply regardless of the number of jobs worked by a student; even if a student works more than one job, they are only allowed to work a total of twenty hours combined across all jobs while class is in session. Beyond this universal hours cap, there is no evidence in the record regarding how schedules vary across the numerous positions in the proposed unit.

Off Campus Student Employment

In addition to these on-campus jobs discussed above, the Employer also compensates students in two categories for work done outside campus. The first type of position is student work internships done with outside organizations. The parties have stipulated to their exclusion from the unit, and thus this position will not be discussed further.

The second type of off-campus work that is compensated by the Employer is service learning work study positions. Petitioner, at hearing, amended its petition to exclude these positions; the Employer, however, did not consent to their specific exclusion, but maintained its general exclusion on the bases of its overall objection to the entire unit as not being 2(3) employees, and the lack of community-of-interest across the entire unit. The service learning work positions are coordinated with an "assigned community partner," who is an outside organization. Student workers in this position work at the assigned community partner, but are still employed by the Employer. The outside community partner is charged with interviewing potential student workers, and community partners are allowed to select the student worker that is "the best fit for their organization." In addition to their work for the community partner, students in these positions are required to attend monthly meetings at the Employer and two

career development workshops during the academic year.[4] The job descriptions provided by the Employer indicate that outside partners include the Grinnell Chamber of Commerce; Grinnell Arts Council; Imagine Grinnell; Poweshiek Iowa Development; Crisis Intervention Services; and Mid-Iowa Community Action.

Mentored Advanced Projects

The Petitioner also seeks to exclude Mentored Advanced Projects (MAPs) positions from the petitioned-for unit. The Employer did not take a position on this specific exclusion, instead, when asked if they would stipulate to the exclusion, the Employer stated "I'd have to consider it," and then prior to the close of the record, did not respond any further regarding this matter. However, it is apparent that the Employer would apply its overall objection to the unit to this position as well. According to the general student handbook, MAPs are designed to provide students an opportunity "to contribute to the original scholarship of the field of study and may be disseminated professionally through a scholarly publication, presentation, or prize submission." MAPs are assigned a course number (499) and students are given academic credit for their work. They are additionally paid pursuant to a stipend. MAPs can, and often are, completed during the summer when most classes are out of session. There is no job description for the MAPs position, and they are not included in the wage matrix discussed above. MAPs positions, in contrast to other employment positions, are apparently approved by the Dean of Students and are not coordinated through the human resources department, according to the student handbook.

The Existing Bargaining Unit in Dining Services

As mentioned above, Petitioner seeks to combine the petitioned-for student worker positions into an existing bargaining unit in the dining services division. The dining services bargaining unit was certified via a Board election on May 12, 2016. According to Employer Exhibit A, page 24, approximately nineteen percent of student workers are currently employed in dining services; additionally, there are an unknown number of non-students who also work in dining services.

Since the bargaining unit was certified, the parties have negotiated two collective-bargaining agreements. The parties currently have a collective-bargaining agreement that is in effect until June 30, 2019.

ANALYSIS

Are Student Workers Employees Under Section 2(3) of the Act?

The Board recently addressed the question of whether graduate student and undergraduate student assistants qualified as statutory employees in *Columbia University*, 364 NLRB No. 90 (Aug. 23, 2016). The Board determined that these student workers qualified as

[4] The Employer submitted six pages of a handbook related to these student work positions, which appears to be an incomplete copy. This summary of the service learning work study is derived primarily from that incomplete handbook.

employees under the Act. The Board first noted that the broad language of Section 2(3) indicated that Congress intended the Act to cover "any employee." The Board next relied on the fact that, as opposed to other excluded categories of workers, there was no statutory language excluding student workers from coverage under the Act. *Id.*, slip op. at 1–2. Based on these statutory principles, the Board found that "it is appropriate to extend statutory coverage to students working for universities covered by the Act unless there are strong reasons *not* to do so."

In reaching this finding, the Board considered and rejected its prior holding in *Brown University* that "the graduate assistants *cannot* be statutory employees because they 'are primarily students and have a primarily educational, not economic, relationship with their university.'" *Id.*, slip op. at 2 (quoting *Brown University*, 342 NLRB 483, 487 (2004)). The Board, in *Columbia University*, concluded that this "educational rationale" could not overcome the plain language of the statutory scheme, and therefore "student assistants who have a common-law employment relationship with their university are statutory employees under the Act." *Id.*

The test of whether a common-law employment relationship exists is, in turn, well-established and straightforward. A worker qualifies as a common-law employee where they 1) provide services; 2) under direction of the purported employer; 3) for compensation. *Id.,* slip op. at 1–2.

In applying the relevant precedent to this case, I first find that *Columbia University* applies to the student workers in the petitioned-for unit. There is no indication that any of the workers in the unit are more intrinsically intertwined with the educational relationship of the Employer than the teaching assistants in *Columbia University*. In fact, many of the student workers in the petitioned-for unit work in positions that are much less connected to the educational mission of the Employer than those at issue in *Columbia University* (for example, lifeguards and desk supervisors). Further, as in *Columbia University*, there is no indication that any other explicit statutory prohibition broadly applies to any employees in the petitioned-for unit.[5]

The Employer bases many of its arguments on the Board's decision in *Brown University*—precedent which, as noted above, was overruled by *Columbia University*—and decisions issued under other statues. Of course, I am without power to overturn extent Board precedent, and therefore, must follow the Board's direction in *Columbia University*. As such, these arguments are unavailing.

[5] There are some potential indications in the record that an unknown number of student workers may possess certain supervisory indicia. The Employer did not raise this issue in its Statement of Position, nor did either party explicitly attempt to address it during the hearing. Therefore, this issue is waived for purposes of this Decision. Further, to the extent that either party believes an individual should be excluded from the unit due to their supervisory status or any other statutory exclusion, they retain the option to challenge that individual's vote during the election.

Beyond its arguments based on expired precedent and largely irrelevant case law, the Employer further contends that *Columbia University* should not apply to its student workers because they are undergraduate students who experience regular turnover every four years. This argument is unavailing for several reasons. First, the bargaining unit in *Columbia University* actually included undergraduate research assistants in the bargaining unit.[6] Second, the statutory interpretation relied on in *Columbia University* applies with equal force to undergraduate student workers, as the Act does not distinguish between graduate and undergraduate workers. Third, to the extent the Employer argues that the turnover in the proposed unit makes it inappropriate for collective bargaining, the Board in *Columbia University* explicitly rejected this argument, emphasizing that the relatively short tenures in the bargaining unit did not invalidate the unit where this tenure was shared by all student workers. *Id.,* slip op. at 20; *see also University of Vermont*, 223 NLRB 423, 427 (1976). The same result follows here.

The Employer makes several additional arguments as to why collective-bargaining would be contrary to other laws and would deal a "fatal blow" to the Employer's mission. These arguments, to the extent they have not already been directly addressed by the Board's decision in *Columbia University,* are unpersuasive. The Board has consistently held that hypothetical conflicts with other statutes are meant to be handled in the collective-bargaining process, and do not otherwise serve as a bar to a representation election. *See, e.g., Columbia University,* 364 NLRB No. 90, slip op. at 12–13. The Employer's contentions about how collective bargaining would affect financial aid, limit the number of jobs available to students, interfere with the ability to hire qualified students, negatively impact the egalitarian culture of the college, and otherwise undermine the college's mission are speculative and not based on any concrete evidence. Indeed, the Employer's experience with the existing bargaining unit in dining services provides at least some weight against these contentions. No witness was able to provide any example where the collective-bargaining process had conflicted with existing education law, nor were any witnesses able to point to an example of how the practice and procedure of collective-bargaining had undermined the college. In any event, these arguments do not permit me to disregard the binding precedent in *Columbia University.*

Having found that *Columbia University* is controlling, the remaining question to be addressed is whether the student workers in the proposed unit qualify as common-law employees. I find that they do. The numerous classifications all provide services to the college; indeed, the student employment handbook characterizes these services as "vital" to the operation of the college.[7] These services are performed under the direction of the Employer's human resources department, and specifically its Human Resources Training and Student Employment Coordinator, pursuant to job descriptions created by the Employer that lay out the duties and

[6] The Employer contends, erroneously, that the bargaining unit in *Columbia University* only included graduate-level workers. This is clearly incorrect, as the Board decided "that the petitioned-for bargaining unit (comprising graduate students, terminal Masters' degree students, and *undergraduate students*) is an appropriate unit." *Id.,* slip op. at 2.

[7] The Employer further argues, as an ancillary part of its argument against common-law employment, that the student workers cannot be employees because "if they were not students, the work opportunity would not be available to them." This argument is foreclosed by *Columbia University,* as the unit certified in that case similarly consisted of positions that were only available to students at the college.

responsibilities of each position in the proposed unit.[8] Finally, these positions all receive compensation, as indicated by the Employer's wage matrix. As such, I find that the proposed unit consists of common-law employees, and that therefore the student workers are covered under Section 2(3) of the Act.

Is the Petitioned-for Unit an Appropriate Unit Under the Act?

When determining an appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective bargaining must function. Therefore, each unit determination must foster efficient and stable collective bargaining. *Gustave Fisher, Inc*., 256 NLRB 1069 (1981). On the other hand, the Board has also made clear that the unit sought for collective bargaining need only be an appropriate unit. Thus, the unit sought need not be the ultimate, or the only, or even the most appropriate unit. *Overnite Transportation Co*., 322 NLRB 723, 723 (1996). As a result, in deciding the appropriate unit, the Board first considers whether the unit sought in a petition is appropriate. *Id*. When deciding whether the unit sought in a petition is appropriate, the Board focuses on whether the employees share a "community-of-interest." *NLRB v. Action Automotive,* 469 U.S. 490, 494 (1985). In turn, when deciding whether a group of employees shares a community-of-interest, the Board considers whether the employees sought are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *United Operations, Inc*., 338 NLRB 123 (2002). All relevant factors must be weighed in determining community-of-interest. The Board has further clarified that these same community-of-interest standards apply at academic institutions, such as the Employer's, as they apply in other employment settings. *Livingstone College,* 290 NLRB 304, 305 (1988); *Cornell University,* 183 NLRB 329, 336 (1970).

The Board has further held that a petition that seeks to represent all employees at an employer's facility (a wall-to-wall bargaining unit) is presumptively appropriate under the Act. *See* Section 9(b). This same presumption applies equally in the case of educational institutions, as explained by the Board in *Livingstone College*, 290 NLRB at 304–05*:*

> In determining the appropriateness of a nonprofessional unit in a college or university environment, the Board applies the rules traditionally used to determine the appropriateness of a unit in an industrial setting. In this regard, a campus or collegewide unit, like a plantwide unit, is viewed by the Board as presumptively

[8] The Employer argues that the directions provided under the outside research grants in *Columbia University* provides a level of direction that is not provided to student workers in the instant case. This argument is unavailing, and in my view actually supports finding a common-law employment relationship here. The student workers here (and their supervisors) uniformly testified that students performed work at the Employer's direction. This direction appears to have largely come *directly* from the Employer, as opposed to an outside organization supplying grants. Therefore, the Employer here exercises a greater level of direction than the employer in *Columbia University.*

> appropriate under the Act. The burden of proving that the interests of a given classification of employees are so disparate from those of the others that they cannot be represented in the same unit rests with the party challenging the unit's appropriateness. . . .

See also Research Foundation of the City University of New York, 337 NLRB 965, 972 n.18 (2002).

Does a Wall-to-Wall Presumption Apply in this Matter?

Petitioner petitioned in this case to combine all student workers who work for the Employer into a single bargaining unit. As mentioned by the hearing officer at the outset of the hearing, the petitioned-for unit carries a presumption of appropriateness, which must be rebutted by the party seeking to exclude certain categories from the unit (in this case, the Employer). Over the course of the hearing, however, the parties agreed to exclude certain positions from the proposed unit, specifically students who worked at off-campus internships through the CLS office and non-student temporary employees. Additionally, on the record, Petitioner stated it seeks to exclude service learning work study positions and MAPs participants.

These exclusions raise an arguable issue as to whether the presumption stated at the outset of the hearing still applies to the petitioned-for unit. I find that this presumption still applies. The Board has held that exclusions for positions that only occasionally work at an otherwise wall-to-wall unit do not destroy a single facility presumption. *See, e.g., RB Associates, Inc.*, 324 NLRB 874 (1997). Here, the evidence demonstrates that the off-campus interns and service learning work study positions perform the vast majority of their duties off campus. These positions also perform work that primarily benefits the outside entities and, in contrast to other positions, are not performed to benefit the day-to-day operations of the Employer. Therefore, consistent with *RB Associates,* their exclusion does not remove the presumption.

As to the remaining exclusions, I also find that these do not otherwise remove the presumption in this matter. The MAPs position, as explained in more detail below, is almost entirely academic in character and does not constitute employment. The temporary casual employees who are on a leave of absence are, by definition, not student employees (as they are not students at the time of their employment). The Employer's student leave of absence employment policy confirms this fact, as it states "[a]lthough a leave of absence holds a place for you at the College to return to, you will not be considered a student here during the period of your leave." Further, given that students are limited to only two semesters of leave of absence, their status in this position is necessarily of a limited duration and temporary. As such, their exclusion does not rebut the presumption that applies in this case.[9]

[9] At the outset of the hearing, the parties were put on notice that the petition sought a wall-to-wall unit. While on notice of the wall-to-wall nature of the unit, beyond these disputed classifications, the parties did not discuss any other positions on the record that could be included or otherwise would impact the wall-to-wall presumption in this case.

Did the Employer Rebut This Presumption?

Having determined that a wall-to-wall presumption applies to this unit, the burden is on the objecting party (in this case, the Employer) to demonstrate that the unit is nonetheless inappropriate. In the case of educational institutions, the Board has held that the objecting party must present evidence that a classification sought to be excluded from a wall-to-wall unit must possess interests that are "so disparate" from other classifications in the unit that they "cannot be represented in the same unit." *Livingstone College,* 290 NLRB at 305. In order to rebut this presumption, the Employer was instructed at the outset of the hearing of the need to present specific, detailed evidence in support of its position that the petitioned-for unit does not possess a community-of-interest.

I find that the evidence presented in this matter falls far short of that necessary to demonstrate that any particular classification in the petitioned-for unit is so disparate that they are unable to be represented in the same unit. The Employer's evidence largely related to policy arguments as to the various ways in which collective-bargaining would inhibit the educational mission of the college. The Employer failed to present detailed evidence regarding terms and conditions of employment for student employees, administrative structure, position functions, or other specific evidence related to community-of-interest factors. The evidence that the Employer did present related to this presumption, consisted largely of policy manuals and job descriptions that were unsupported by any context or testimony. The Board has held in similar circumstances that summary and conclusory evidence, like that relied on by the Employer here, is insufficient to rebut a presumption of unit appropriateness. *New Britain Transportation Co.*, 330 NLRB 397, 398 (1999) (summary of interchanges between facilities, without supporting context, insufficient to rebut single facility presumption). As such, the Employer has failed to rebut the presumption that applies in this matter.

Is There Nonetheless a Community-of-Interest?

Moreover, even assuming that a presumption did not apply, a review of the community-of-interest factors supports finding the petitioned-for unit to be an appropriate unit. As discussed above, the traditional community-of-interest factors include the interchange of employees in the unit; shared terms and conditions of employment; common supervision; the Employer's administrative organization of employees; and the level of skill and training required for the positions. . Taking these factors in turn, I find that the majority of these factors weigh in favor of finding a community-of-interest in the proposed unit.

The strongest factor in support of the community-of-interest in this unit is the level of interchange between employees in the unit. The record demonstrates that a large percentage of currently employed student workers concurrently hold more than one position in the proposed unit. Both workers and administrators further testified that employees often change positions within the proposed unit during their time at the college. This strongly supports a community-of-interest finding in the petitioned-for unit. *Executive Resource Associates,* 300 NLRB 400, 401

and n.10 (1991), citing *Spring City Knitting Co. v. NLRB,* 647 F.2d 1011, 1015 (9th Cir. 1981) (declaring that "frequency of interchange is a critical factor" in community of interest analysis).

Many of the core terms and conditions of employment of employees in the proposed unit also support a community-of-interest finding. All employees are subject to the same strict cap in weekly hours. The employees are also compressed within a narrow wage band. There is also geographic proximity within the petitioned-for unit, as all employees work on the college's campus. The employees are all subject to the same policies, as contained in the Employer's standard employment handbook. The Board has consistently held that all of these factors support a finding of community-of-interest. *See, e.g., United Rentals,* 341 NLRB 540, 541–42 (2004); *Allied Gear & Machine Co.*, 250 NLRB 679, 680 (1980) (relying on similar wages, benefits, and work location in determining community-of-interest).

These positions are also functionally integrated with the operations of the Employer. Functional integration refers to when employees' work constitutes integral elements of an employer's production process or business. Evidence that employees work together on the same matters, have frequent contact with one another, and perform similar functions is relevant when examining whether functional integration exists. *Transerv Systems*, 311 NLRB 766 (1993). As frequently stated by the Employer's witnesses, the Employer is in the business of providing education and support services to students. As acknowledged by the Student Employee Handbook, these student workers form an essential part of the Employer's ability to perform the "day to day operations" which are vital to carrying out its educational and support services missions. Although the record is sparse regarding the amount of day-to-day contact between student workers across the various classifications, the fact that numerous employees hold multiple positions simultaneously further supports the functional integration in the proposed unit.

The remaining community-of-interest factors are insufficient to otherwise render the unit inappropriate. For example, while it is clear that the student workers in the dozens of classifications in this unit necessarily must have different immediate supervisors, the evidence demonstrates that this supervision is ultimately centralized through one individual—the Human Resources Training and Student Employment Coordinator. Similarly, while these student workers are in numerous administrative groupings throughout campus, they are also all ultimately within the rubric—indeed, comprise the entirety—of student workers on campus. Finally, while it appears from the job descriptions that certain positions in the unit require specialized skills, this is rebutted, at least in part, by the testimony from one administrator that "every job on campus is available to every student." As such, considering the totality of the circumstances in this case, I find that the proposed unit is presumptively appropriate, and that in any event it shares a sufficient community-of-interest to form a suitable unit for purposes of collective bargaining.[10]

[10] I further note that in fashioning overall or larger units, the Board is reluctant to leave a residual unit where the employees could be included in the larger group. *Huckleberry Youth Programs*, 326 NLRB 1272, 1274 (1998); *International Bedding Co*., 356 NLRB 1336, 1337 (2011); *see also United Rentals, Inc*., 341 NLRB 540, 542 fn. 11 (2004) (only unrepresented employees at facility included in unit despite sparse record of community-of-interest). The Employer here has not presented any smaller unit that would be appropriate, and it appears that cleaving the unit here along the Employer's various departmental classifications would create numerous residual units.

Are Petitioner's Disputed Exclusions Appropriately Excluded from the Unit?

I first find that the service work learning position is appropriately excluded from the proposed unit. As opposed to every other position in the proposed unit, workers in these positions do not physically work on campus. They are not functionally integrated into the business of running the campus and facilitating teaching, as other student workers in the proposed unit. Rather, they perform their duties for outside parties. Further, while they are technically employed by the Employer, they are necessarily supervised by personnel at their off-campus jobsite. As a practical matter, including these employees in the bargaining unit would create a host of unique and difficult issues specific to the limited number of individuals who work off campus. As such, these employees are properly excluded. *See, e.g., Bradley Steel, Inc*., 342 NLRB 215 (2004).

The parties also dispute the inclusion of Mentored Advanced Project positions in the unit. I find that these positions are also properly excluded from the unit. MAPs appear to be solely focused on furthering the educational goals of an individual student, as opposed to the overall goals or day-to-day operation of the Employer. MAPs are for academic credit, are assigned a course number (499) and are approved through the dean's office, not human resources.[11] These positions are not included in the Employer's wage matrix, nor are there any job descriptions for these positions. The only reference to these positions is in the general student handbook, where they are listed as a type of independent study. Further, as opposed to most, if not all, other positions in the unit, MAPs often are completed during the summer. As opposed to the hourly wages paid to other positions, MAPs are paid pursuant to a stipend. All of these factors way in favor of exclusion from the proposed unit.

The most tellingly factor in excluding the MAPs position is listed in the Employer's own academic handbook, which states that the "[p]roducts of MAPs are expected to contribute to the original scholarship of the field of study and may be disseminated through a scholarly publication, presentation, or prize submission." The fact that students may receive a stipend for completing these projects does not otherwise change their almost entirely academic character. In short, these positions focus on facilitating the individual students' academic achievement. This clearly distances MAPs from other educational jobs, such as research and teaching assistants, which are primarily focused on facilitating the teaching operations of the Employer. In reality, the evidence demonstrates that the MAPs position does *not* perform a service for the Employer, and therefore, individuals in those positions do not qualify as Section 2(3) employees. As such, MAPs are appropriately excluded from the unit sought by Petitioner.

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[11] The Employer's president testified that there are certain employment positions that also receive academic credit, but was unable to identify any specific jobs where this was the case. My review of the record evidence does not disclose evidence of any other positions where students receive academic credit for their work.

Can the Proposed Bargaining Unit Be Appropriately Combined With the Existing Dining Services Unit Under *Armour-Globe*?

As to the remaining issue in this case, whether the proposed unit can be combined with the existing dining services unit under *Armour-Globe,*[12] I find that the Employer has waived this argument. The Board's Rules and Regulations clearly state that any matter not referenced in the pre-hearing statement of position is waived. § 102.66(d) ("A party shall be precluded from raising any issue . . . and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position . . . ."). The Employer's Statement of Position, which is over 30 pages in length, raises many issues but makes no mention of whether the petitioned-for unit can be appropriately combined with the existing unit. Further, at the outset of the hearing, the Hearing Officer gave the Employer the opportunity to clarify whether it intended to make any arguments under *Armour-Globe*, and the Employer affirmatively stated it did not. Under these circumstances, there can be no question regarding the Employer's waiver of this argument.

Even assuming that the issue was not waived, I find that the petitioned-for unit can be integrated with the existing dining services unit. The Board has held that such additions are appropriate provided that the employees to be added constitute a defined group and share a community-of-interest with the existing unit. *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990); *Capital Cities Broadcasting Corp.*, 194 NLRB 1063 (1972). The same factors that support an overall community-of-interest in this case support the merger of these two bargaining units. As discussed above, employees in the petitioned-for unit frequently interchange with employees in the existing dining services unit. Indeed, employees in dining services often work simultaneously in other positions in the proposed unit. The units share similar wages and are ultimately all supervised by the same human resources department. They are functionally integrated with the Employer's overall mission, and work in close geographic proximity to one another. As such, allowing the petitioned-for unit to be combined with the existing unit is appropriate under Board law.

CONCLUSION

In determining that the unit sought by Petitioner is appropriate, I have carefully weighed the parties' arguments regarding the employee status of the student workers, whether the petitioned-for unit shares a community-of-interest, and whether the petitioned for unit shares a community-of-interest with the existing dining service unit, for which the petition seeks to combine it with. I conclude that the Board's decision in *Columbia University,* finding that student workers are employees under the Act, applies in this situation and that the student workers here are employees under the Act. I further find that the student workers in the petitioned-for unit form a presumptively appropriate wall-to-wall unit, and that in any event share a sufficient community-of-interest to form an appropriate unit. Lastly, I find that there is a

[12] The *Armour-Globe* formulation is derived from two early Board cases: *Armour & Co.*, 40 NLRB 1332 (1942) and *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

sufficient community-of-interest between the petitioned-for unit with the existing unit to order an *Armour-Globe* election that would result in a combined unit, if the petitioned-for unit votes in favor of representation.

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[13]

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> ***Included:*** All student employment positions.
>
> ***Excluded*:** Positions in Dining Services, Service Work Learning positions, off-campus interns, Mentored Advanced Project (MAP) positions, non-student temporary employees, and supervisors and guards, as defined in the Act, as amended.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Union of Grinnell Student Dining Workers.

A. Election Details

[13] The Employer, The Trustees of Grinnell College, a private nonprofit corporation for education purposes, is an institution for higher learning with its principal place of business in Grinnell, Iowa. During the past 12 months, a representative period, the Employer derived gross revenues in excess of $1,000,000 and, during that same period of time, purchased and received at its Grinnell, Iowa facilities products, goods and materials valued in excess of $50,000 directly from points outside the State of Iowa.

The election will be held on Tuesday, November 27, 2018 from 9:00 a.m. to 5:00 p.m. at Grinnell College, 1115 8th Avenue, Grinnell, Iowa, in the Joe Rosenfield Center, Room 101.

B. Voting Eligibility

Eligible to vote are those in the unit who had active logged work hours in payroll from September 16, 2018 to October 31, 2018[14], including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Wednesday, November 7, 2018**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be

[14] On the record, the parties stipulated to an eligibility formula for anyone in the unit that had active logged hours in payroll between September 16, 2018 and October 15, 2018. In a follow-up question from the Region to the parties seeking clarification, the parties indicated the end date was based on the most recent pay date and that their stipulation should be extended to October 31, 2018. As this is a unique formula, of which the necessity for or later application is unknown, should the election be significantly delayed for any reason, the parties should be consulted regarding any eligibility formula that may later be applied.

used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: Monday, November 5, 2018

/s/ Jennifer A. Hadsall

JENNIFER A. HADSALL
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 18
Federal Office Building
212 Third Avenue South, Suite 200
Minneapolis, MN 55401-2657

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

UNIVERSITY OF CHICAGO

Employer

and

Case 13-RC-198365

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 743[1]

Petitioner

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a unit of all hourly paid student employees of the Employer's libraries. The Employer contends that *Trustees of Columbia University in the City of New York*, 364 NLRB No. 90 (2016) (*Columbia University*) was wrongly decided and the Board should return to the standard in *Brown University*, 342 NLRB 483 (2004). However, prior to taking evidence regarding the Employer's contention, the hearing officer required the Employer to submit an offer or proof regarding the evidence it intended to present in support of its contention. Pursuant to my instructions following the Employer's offer of proof, the hearing officer did not allow the Employer to present its evidence. I hereby affirm the refusal to allow evidence.

Because I conclude that the unit sought by Petitioner is appropriate for collective bargaining and that a question of representation exists under Section 9(c) of the Act, I am directing an election in this matter in the unit sought by Petitioner.

The Employer also contends that certain individuals in the petitioned-for unit may be covered by the petition in Case 13-RC-198325.[2] Because the Employer's contention concerns whether certain individuals should be included in the unit in the instant matter and, therefore, concerns their eligibility to vote, I further conclude that the Employer's contention need not be litigated or resolved before the election is conducted because the resolution of the issue would not significantly change the size or character of the unit.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

---

[1] The Graduate Students United was served with the Notice of Hearing, but declined to intervene. It was not present at the hearing and has not asserted any position with regard to the unit appropriate herein, the statements of unit contentions are limited to those made by the Petitioner and the Employer.

[2] I take administrative notice of the petition and first amended petition in Case 13-RC-198325 and the Employer's statement of position in that matter.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

At the start of the hearing in this matter, the hearing officer reviewed with the parties their positions regarding both the appropriateness of the unit and any eligibility issues with regard to individual voters. At that time the Employer contended that: 1) the petitioned-for employees are not "employees" under Section 2(3) of the Act; 2) a certified collective-bargaining representative would interfere with the predominantly educational nature of the relationship between the petitioned-for employees and the Employer; and, 3) the petitioned-for unit consists of temporary and/or casual employees. Thereafter, pursuant to Section 102.66(c) of the Board's Rules and Regulations, the hearing officer required the Employer to present an offer of proof identifying its witnesses who would testify and setting forth both a summary of their testimony and any documentary evidence the Employer would offer. Following receipt of the offer of proof, I reviewed it to determine if it was sufficient to sustain the Employer's position.

After reviewing the Employer's offer of proof, I concluded that the evidence described in it is insufficient to sustain the Employer's contention that: 1) the petitioned-for employees are not "employees" under Section 2(3) of the Act; 2) a certified collective-bargaining representative would interfere with the predominantly educational nature of the relationship between the petitioned-for employees and the Employer; and, 3) the petitioned-for unit consists of temporary and/or casual employees. Therefore, consistent with Section 102.66(c), I instructed the hearing officer to decline to accept evidence from the Employer related to its contention. I hereby affirm that the Employer's offer of proof is insufficient, and in doing so conclude that the facts the Employer included in its offer would not sustain its position.

The only remaining issue is the inclusion of certain individuals in the unit and, therefore, the eligibility of certain individuals to vote. Pursuant to instructions from me, the hearing officer provided the parties with an opportunity to further explain their positions on the record. Of the 226 student employees in the petitioned-for unit, approximately 27 graduate students employed in the libraries, who are therefore covered by the instant position, also have separate employment with the Employer as teaching assistants, research assistants, course assistants, workshop coordinators, writing interns, preceptors, language assistants, instructors, lecturers, lectors, and teaching interns and are therefore potentially covered by the petition filed in Case 13-RC-198325. The Employer claimed the students holding dual employment must be included in one

[3] The parties stipulate, and I find, The University of Chicago, an Illinois private non-profit corporation, is a teaching and research university located in the City of Chicago, Illinois. During the past calendar year, a representative period, the University derived gross revenues in excess of $1,000,000 and received goods and materials valued in excess of $50,000 from points located directly outside the State of Illinois.

or the other unit, citing *Nu-Life Spotless, Inc.*, 215 NLRB 357 (1974). The Union argued that the individuals at issue were dual-function employees and, therefore, eligible voters under both petitions, citing *Harold J. Becker Co., Inc.*, 343 NLRB 51 (2004); *Medlar Electric, Inc.*, 337 NLRB 796 (2002); *Columbia College*, 346 NLRB 726 (2006); *KCAL-TV*, 331 NLRB 323 (2000). Because Petitioner's statement at hearing and the Employer's statement of position raise eligibility issues affecting at most 12 percent of the unit, I conclude that the disputed employees would not significantly change the size or character of the unit and thus the contentions are not relevant to a question concerning representation. Therefore, I instructed the hearing officer to not allow the parties to present evidence, as I concluded that it was unnecessary to resolve the eligibility issues before the election is conducted.

Because the proposed unit is appropriate, consistent with Section 102.66(d) of the Board's Rules and Regulations, I direct an election in the following unit of employees and order that the individuals in those classifications may vote in the election but their ballots shall be challenged since their eligibility has not been resolved:

> Included: All hourly paid student employees of the University of Chicago Libraries, including students employed at the Joseph Regenstein Library, the Joe and Rika Mansueto Library, Eckhart Library, John Crerar Library, D'Angelo Law Library, and the Social Services Administration Library.
>
> Excluded: All employees represented by other labor organizations and covered by other collective-bargaining agreements, temporary employees, managerial employees, guards, and professional employees and supervisors as defined in the National Labor Relations Act.
>
> **OTHERS PERMITTED TO VOTE:** At this time, no decision has been made regarding whether graduate students who are employed in the Employer's libraries and also hold positions as teaching assistants, research assistants, course assistants, workshop coordinators, writing interns, preceptors, language assistants, instructors, lecturers, lectors, and teaching interns are included in, or excluded from, the bargaining unit, and individuals in those classifications may vote in the election but their ballots shall be challenged since their eligibility has not been resolved. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Teamsters, Local 743.

A. Election Details

The election will be held according to the following schedule:

Dates	Times	Locations
Friday, June 2, 2017	10:00a.m. - 1:00p.m. and 3:00p.m. - 5:30p.m.	Room 354 at the Joseph Regenstein Library 1100 East 57th Street, Chicago, Illinois
Friday, June 2, 2017	10:00a.m. - 1:00p.m. and 3:00p.m. - 5:30p.m.	Office at the Social Service Administration Library 969 E. 60th Street, Chicago, Illinois
Monday, June 5, 2017	10:00a.m. - 1:00p.m. and 3:00p.m. - 5:30p.m.	Room A-11 at the Joseph Regenstein Library 1100 East 57th Street, Chicago, Illinois
Monday, June 5, 2017	10:00a.m. - 1:00p.m. and 3:00p.m. - 5:30p.m.	2nd Floor Conference Room at the D'Angelo Law Library 1121 East 60th Street, Chicago, Illinois
Tuesday, June 6, 2017	10:00a.m. - 1:00p.m. and 3:00p.m. - 5:30p.m.	Room A-11 at The Joseph Regenstein Library 1100 East 57th Street, Chicago, Illinois
Tuesday, June 6, 2017	10:00a.m. - 1:00p.m. and 3:00p.m. - 5:30p.m.	2nd Floor Conference Room at the D'Angelo Law Library 1121 East 60th Street, Chicago, Illinois
Wednesday, June 7, 2017	10:00a.m. - 1:00p.m. and 3:00p.m. - 5:30p.m.	Room A-11 at the Joseph Regenstein Library 1100 East 57th Street, Chicago, Illinois
Thursday, June 8, 2017	10:00a.m. - 1:00p.m.	Room A-11 at the Joseph Regenstein Library 1100 East 57th Street, Chicago, Illinois

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **May 20, 2017**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are 1) employees who have quit or been discharged for cause since the designated payroll period; 2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and 3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **May 25, 2017**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word (.doc or .docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated at Chicago, Illinois this 23rd day of May 2017.

Peter Sung Ohr, Regional Director
National Labor Relations Board – Region 13
Dirksen Federal Building
219 South Dearborn Street, Suite 808
Chicago, Illinois 60604-2027

Form NLRB-707
(4-2015)

United States of America
National Labor Relations Board

NOTICE OF ELECTION

PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by SECRET ballot under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to an NLRB agent. Your attention is called to Section 12 of the National Labor Relations Act which provides: ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE, OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN $5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off, and also include employees in the military service of the United States who appear in person at the polls. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are *not* eligible to vote.

SPECIAL ASSISTANCE: Any employee or other participant in this election who has a handicap or needs special assistance such as a sign language interpreter to participate in this election should notify an NLRB Office as soon as possible and request the necessary assistance.

PROCESS OF VOTING: Upon arrival at the voting place, voters should proceed to the Board agent and identify themselves by stating their name. The Board agent will hand a ballot to each eligible voter. Voters will enter the voting booth and mark their ballot in secret. DO NOT SIGN YOUR BALLOT. Fold the ballot before leaving the voting booth, then personally deposit it in a ballot box under the supervision of the Board agent and leave the polling area.

CHALLENGE OF VOTERS: If your eligibility to vote is challenged, you will be allowed to vote a challenged ballot. Although you may believe you are eligible to vote, the polling area is not the place to resolve the issue. Give the Board agent your name and any other information you are asked to provide. After you receive a ballot, go to the voting booth, mark your ballot and fold it so as to keep the mark secret. DO NOT SIGN YOUR BALLOT. Return to the Board agent who will ask you to place your ballot in a challenge envelope, seal the envelope, place it in the ballot box, and leave the polling area. Your eligibility will be resolved later, if necessary.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the voting place and at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.

VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

Included: All full-time and regular part-time Tour Guides and Student Fellows employed by the Employer at its Clinton, New York facility **who were employed by the Employer during the payroll period ending September 5, 2021.**

EMPLOYEES NOT ELIGIBLE TO VOTE:

Excluded: Guards, supervisors and confidential employees as defined by the Act, and all other employees.

DATE, TIME AND PLACE OF ELECTION

Friday, September 24, 2021	9:00 AM – 12:00 PM and 3:00 PM – 6:00 PM	Sadove Student Center at Emerson Hall, first floor Conference room 1 Green Apple Way, Clinton, NY

EMPLOYEES ARE FREE TO VOTE AT ANY TIME THE POLLS ARE OPEN.

Form NLRB-707
(4-2015)

United States of America
National Labor Relations Board

NOTICE OF ELECTION

UNITED STATES OF AMERICA
National Labor Relations Board
03-RC-281779

OFFICIAL SECRET BALLOT

For certain employees of

HAMILTON COLLEGE

Do you wish to be represented for purposes of collective bargaining by

UNITED FOOD AND COMMERCIAL WORKERS DISTRICT UNION LOCAL ONE?

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES	NO
☐	☐

IF YOU ARE CASTING THIS BALLOT MANUALLY, AT A POLLING PLACE WITH A BOARD AGENT PRESENT, follow these Instructions:

DO NOT SIGN OR WRITE YOUR NAME OR INCLUDE OTHER MARKINGS THAT WOULD REVEAL YOUR IDENTITY. MARK AN "X" IN THE SQUARE OF YOUR CHOICE ONLY. If you make markings inside, or anywhere around, more than one square,

return your ballot to the Board Agent and ask for a new ballot. If you submit a ballot with markings inside, or anywhere around, more than one square, your ballot will not be counted.

IF YOU ARE CASTING THIS BALLOT BY MAIL: See enclosed instructions.

The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.

Form NLRB-707
(4-2015)

United States of America
National Labor Relations Board

NOTICE OF ELECTION

RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist a union**
- **Choose representatives to bargain with your employer on your behalf**
- **Act together with other employees for your benefit and protection**
- **Choose not to engage in any of these protected activities**
- **In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).**

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- **Threatening loss of jobs or benefits by an Employer or a Union**
- **Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises**
- **An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity**
- **Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or the mail ballots are dispatched in a mail ballot election**
- **Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals**
- **Threatening physical force or violence to employees by a Union or an Employer to influence their votes**

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (716)551-4931 or visit the NLRB website www.nlrb.gov for assistance.

Form NLRB-4910
(4-2015)

United States of America
National Labor Relations Board

NOTICE OF ELECTION

PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. (See VOTING UNIT in this Notice of Election for description of eligible employees.) A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by secret ballot carried out through the U.S. mail under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Employees eligible to vote will receive in the mail *Instructions to Employees Voting by United States Mail*, a ballot, a blue envelope, and a yellow self-addressed envelope needing no postage.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are not eligible to vote.

CHALLENGE OF VOTERS: An agent of the Board or an authorized observer may question the eligibility of a voter. Such challenge must be made at the time the ballots are counted.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.

METHOD AND DATE OF ELECTION

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. On Friday, September 24, 2021, ballots will be mailed to voters from the National Labor Relations Board, Region 03, 130 S Elmwood Ave Ste 630, Buffalo, NY 14202-2465. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by October 4, 2021, should communicate immediately with the National Labor Relations Board by either calling the Region 03 Office at (716)551-4931 or our national toll-free line at 1-844- 762-NLRB (1-844- 762-6572).

All ballots will be commingled and counted at the Region 03 Office on Tuesday, October 12, 2021 at 11:00 a.m. In order to be valid and counted, the returned ballots must be received in the Region 03 Office prior to the counting of the ballots.

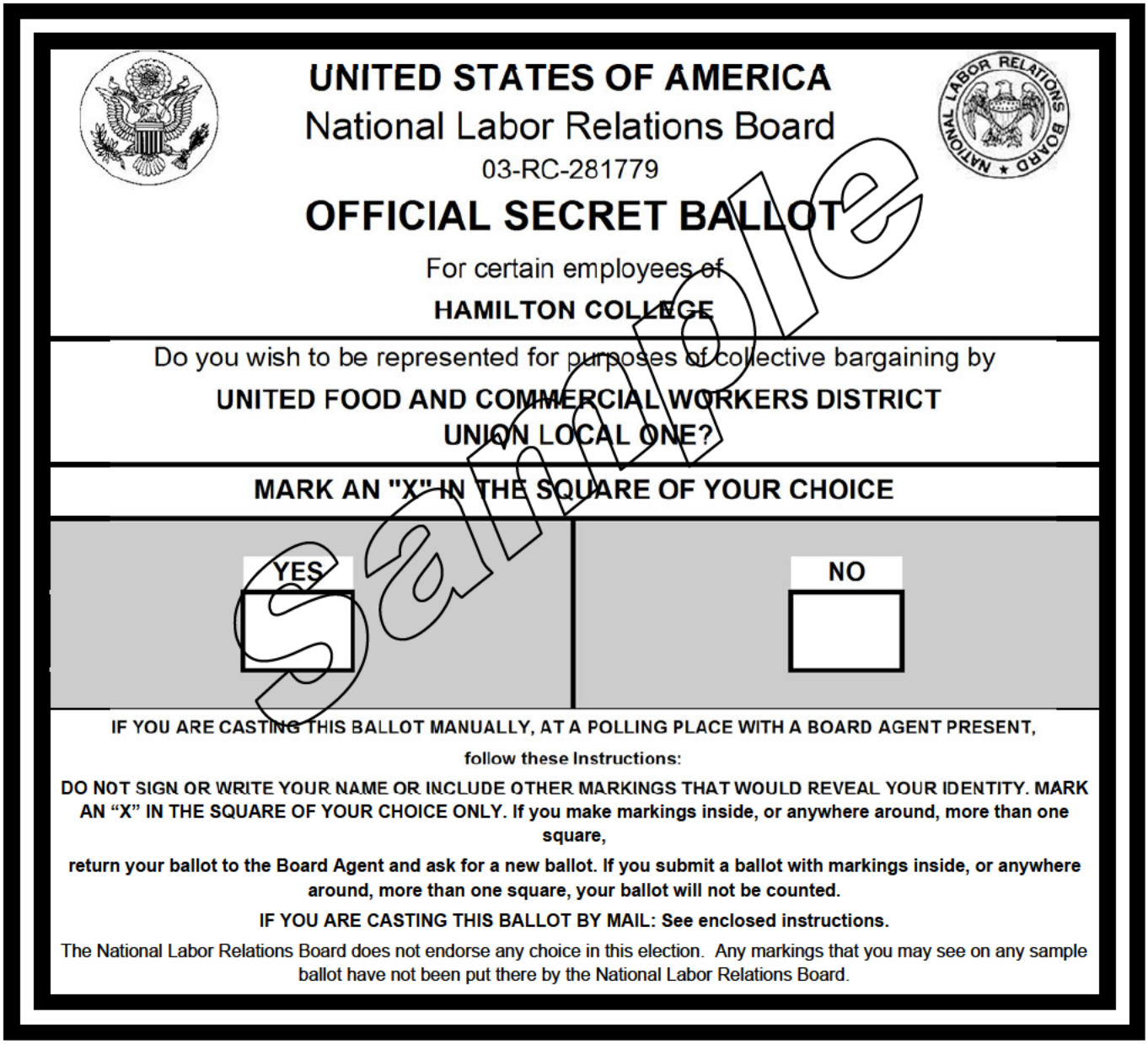
VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

Included: All full-time and regular part-time Tour Guides and Student Fellows employed by the Employer at its Clinton, New York facility **who were employed by the Employer during the payroll period ending September 5, 2021.**

EMPLOYEES NOT ELIGIBLE TO VOTE:

Excluded: Guards, supervisors and confidential employees as defined by the Act, and all other employees.



United States of America
National Labor Relations Board

NOTICE OF ELECTION

RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist a union**
- **Choose representatives to bargain with your employer on your behalf**
- **Act together with other employees for your benefit and protection**
- **Choose not to engage in any of these protected activities**
- **In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).**

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- **Threatening loss of jobs or benefits by an Employer or a Union**
- **Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises**
- **An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity**
- **Making campaign speeches to assembled groups of employees on company time where attendance is mandatory, within the 24-hour period before the mail ballots are dispatched**
- **Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals**
- **Threatening physical force or violence to employees by a Union or an Employer to influence their votes**

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

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FORM NLRB-722
(8-05)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

INSTRUCTIONS TO ELECTION OBSERVERS

The role of observers in an NLRB election is an important one. You are here to see that the election is conducted in a fair and impartial manner, so that each eligible voter has a fair and equal opportunity to express him or herself freely and in secret. As official representatives of the parties in this election, you should undertake your role with a fair and open mind. Conduct yourself so that no one can find fault with your actions during the election. The NLRB appreciates your assistance in this democratic process.

PRINCIPAL FUNCTIONS

- Monitor the election process.
- Help identify voters.
- Challenge voters and ballots.
- Assist Board Agent in the conduct of election.

DUTIES

- BE ON TIME: Observers should report one-half hour before the polls open.
- Identify voters.
- Check off the name of the person seeking to vote. One check before the voter's name is made by
  one party's observer. One check after the name is made by the other party's observer.
- See that only one voter occupies a booth at any one time.
- See that each voter deposits the ballot in the ballot box.
- See that each voter leaves the voting area immediately after depositing the ballot.
- Report any conflict regarding an individual's right to vote to the Board Agent at your table before the individual votes.
- Challenge of Voters: An observer has the right to challenge a voter for cause. A Board Agent may
  also question the eligibility of a voter. Any challenge must be made before the voter's ballot has been placed in the ballot box.
- Report any unusual activity to the Board Agent as soon as you notice it.
- Wear your observer badge at all times during the election.
- Remain in the voting place until all ballots are counted in order to check on the fairness of the count. If the ballots are not counted immediately after the polls close, you will be informed as to when and where the ballots will be counted.

DO NOT

- Keep any list of individuals who have or have not voted.
- Talk to any voter waiting in line to vote, except as instructed by the Board Agent. (Greeting voters as they approach to vote is acceptable.)

- Give any help to any voter. Only a Board Agent can assist the voter.
- Electioneer at any place during the hours of the election.
- Discuss or argue about the election.
- Leave the election area without the Board Agent's permission.
- Use any electronic device including cell phones, laptop computers, personal digital assistants (PDAs), mobile e-mail devices, wired or wireless data transmission and recording devices, etc. (Please turn off or disable these devices before entering the polling area).

FORM NLRB-4175
(5-20)

United States of America
National Labor Relations Board

Instructions to Eligible Employees Voting By United States Mail

INSTRUCTIONS

1. MARK YOUR BALLOT IN SECRET BY PLACING AN X IN THE APPROPRIATE BOX. DO NOT SIGN OR WRITE YOUR NAME OR INCLUDE OTHER MARKINGS THAT WOULD REVEAL YOUR IDENTITY.
2. IF YOU SUBMIT A BALLOT WITH MARKINGS INSIDE, OR ANYWHERE AROUND, MORE THAN ONE SQUARE, YOUR BALLOT WILL NOT BE COUNTED. YOU MAY REQUEST A NEW BALLOT BY CALLING THE REGIONAL OFFICE AT THE NUMBER BELOW.
3. IT IS IMPORTANT TO MAINTAIN THE SECRECY OF YOUR BALLOT. DO NOT SHOW YOUR BALLOT TO ANYONE AFTER YOU HAVE MARKED IT.
4. PUT YOUR BALLOT IN THE BLUE ENVELOPE AND SEAL THE ENVELOPE.
5. PUT THE BLUE ENVELOPE CONTAINING THE BALLOT INTO THE YELLOW ADDRESSED RETURN ENVELOPE.
6. SIGN THE BACK OF THE YELLOW RETURN ENVELOPE IN THE SPACE PROVIDED. TO BE COUNTED, THE YELLOW RETURN ENVELOPE MUST BE SIGNED.
7. DO NOT PERMIT ANY PARTY – THE EMPLOYER, THE UNION(S), OR THEIR REPRESENTATIVES, OR AN EMPLOYEE-PETITIONER – TO HANDLE, COLLECT, OR MAIL YOUR BALLOT.
8. MAIL THE BALLOT IMMEDIATELY. NO POSTAGE IS NECESSARY. For further information, call the Regional Office at:
   716-551-4931

TO BE COUNTED, YOUR BALLOT MUST REACH THE REGIONAL OFFICE

BY **October 8, 2021**

RIGHTS OF EMPLOYEES

Under the National Labor Relations Act, employees have the right:

- To self-organization
- To form, join, or assist labor organizations
- To bargain collectively through representatives of their own choosing
- To act together for the purposes of collective bargaining or other mutual aid or protection
- To refuse to do any or all of these things unless the union and employer, in a state where such agreements are permitted, enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the union that they object to the use of their payments for non representational purposes may be required to pay only their share of the union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both employers and unions to know what is expected of them when it holds an election.

If agents of either unions or employers interfere with your right to a free, fair, and honest election, the election can be set aside by the Board. Where appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in the setting aside of the election:

- Threatening loss of jobs or benefits by an employer or a union
- Promising or granting promotions, pay raises, or other benefits to influence an employee's vote by a party capable of carrying out such promises
- An employer firing employees to discourage or encourage union activity or a union causing them to be fired to encourage union activity
- Incitement by either an employer or a union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a union or an employer to influence their votes.

The National Labor Relations Board protects your right to a free choice

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law. The National Labor Relations Board as an agency of the United States Government does not endorse any choice in the election.

NATIONAL LABOR RELATIONS BOARD
an agency of the
UNITED STATES GOVERNMENT

Annual FERPA Notification

Jump to:

Access to Records by Students

Student education records are protected by the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, 34 C.F.R. Part 99. Students may inspect all education records directly related to them that are maintained by Kenyon within 45 days of the date the inspection request is received. A student should submit to the Registrar, Dean, head of the Academic Department, or to the official who keeps the record a written request that identifies the record(s) the student wishes to inspect. The school official will make arrangements for access and notify the student of the time and place where the records may be inspected. If the records are not maintained by the official to whom the request was submitted, that official shall advise the student of the correct official to whom the request should be made.

Student requests for transcripts (https://www.kenyon.edu/offices-and-services/registrar/transcripts/) can be made online to the Office of the Registrar.

For purposes of this policy, "education records" do not include: records kept in the sole possession of the maker, used only as a personal memory aid, and are not revealed to any other person except a temporary substitute for the maker of the record; Title IX or other Civil Rights records where confidentiality has been requested by the complainant and no official action is taken; records of the Campus Safety Office; records created or received by Kenyon after an individual is no longer a student and that are not related to the individual's attendance as a student; confidential letters placed in files before January 1, 1975; financial records of parents; and letters of recommendation to which students have waived the right of access.

Treatment records maintained by the Health and Counseling Center and the College chaplains are also not "education records" for purposes of this policy. Students interested in accessing these records should contact the Health and Counseling Center directly.

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Access to Student Records by Others

Access to Student Records by Others

Education records may generally be accessed by the student to whom which they relate and by College officials with legitimate educational interests. A College official typically includes a person employed by the College in an administrative, supervisory, academic, research, or support staff position (including law enforcement unit personnel and health staff), a person serving on the board of trustees, or a student serving on an official committee such as the Student Conduct Review Board. A College official may also include a volunteer or contractor outside of the College who performs an institutional service or function for which Kenyon would otherwise use its own employees and who is under the direct control of the school with respect to the use and maintenance of personally identifiable information from education records, such as an attorney, auditor, or collection agent or a student volunteering to assist another College official in performing his or her tasks. A College official typically has a legitimate educational interest if the official needs to review and education record in order to fulfill his or her professional responsibilities for the College.

Aside from disclosure to the student and disclosures to College officials, typically student consent is required to disclose education records. However, the College may disclose education records without consent of the student as follows:

- To parties in connection with financial aid for which the student has applied or which the student has received, if the information is necessary to determine eligibility for the aid, determine the amount of the aid, determine the conditions of the aid, or enforce the terms and conditions of the aid.
- To parents of a student regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the College, governing the use or possession of alcohol or a controlled substance if it is determined the student committed a disciplinary violation and the student is under the age of 21.
- To officials of another school where the student seeks or intends to enroll, or where the student is already enrolled if the disclosure is for purposes related to the student's enrollment or transfer.
- To certain federal, state and local educational authorities in connect with an audit or evaluation of federal or state programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs.
- To accrediting organizations to carry out their accrediting functions.
- To comply with a judicial order or lawfully issued subpoena.
- To persons conducting educational or research studies about colleges and students, with the provision that only aggregate (not personally identifiable) data will be released.
- To appropriate officials in connection with a health or safety emergency.
- To a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense, subject to the requirements of Federal regulations.
- To the general public, the final results of a disciplinary proceeding, subject to the requirements of Federal regulations, if the school determines the student is an alleged perpetrator of a crime of violence or non-forcible sex offense and the student has committed a violation of the school's rules or policies with respect to the allegation made against the student.
- To parents of a dependent student for IRS tax purposes. More information on when Kenyon may share information under this provision can be found via the Parent Notification (https://www.kenyon.edu/offices-and-services/registrar/parent-notification/).

"Directory information" may be released without the consent of the student. Directory information takes two forms. Public directory information (i.e., name, class year, email address, advisor, majors, minors, concentrations, degree in progress or degree awarded, dates of attendance, date of graduation, honors and awards, high school attended, and similar information) is available to the public unless the student expressly prohibits their publication in writing to the Office of the Registrar. On-campus directory information (including all of the public directory information, as well as home address and campus address) is available to students and employees with Kenyon network accounts.

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Documentation of Requests for Access to Student Records

Kenyon maintains, as a part of the educational record of the student, a record of all requests for access (whether or not the requests were granted). This record includes: the name of the party who requested the information, the date of the request, and the legitimate interest this party had in requesting the information. Such records are not maintained when: the student personally inspects his or her records, disclosures are made at the request of the student, or disclosures are made to Kenyon employees or agents with a legitimate educational interest in the records.

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Questions about Record Accuracy: Challenges to Content

Students have the right to question the accuracy of their records and request interpretations of the contents of their records. The following College officers should be consulted:

- Admissions: Vice President of Enrollment Management and Dean of Admissions
- Accounting: Controller
- Student Affairs: Dean of Students
- Financial Aid: Director of Financial Aid
- Registrar's Office: Registrar

Each of these officers will answer questions and interpret information in student records as appropriate.
If a student believes that education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, the student may ask the College in writing to the amend the record. The request should be given to the appropriate administrator listed above or, if the appropriate administrator cannot be identified, to the Registrar, who shall forward the request to the appropriate administrator that can address the request. The request should include information regarding the record or specific portions of a record that the student wishes to amend, the desired amendment, and the reasons for which the amendment is sought, including any evidence the student believes is relevant. The administrator to whom the request is made shall issue to the student a written decision within a reasonable time after the request is received. If the record will not be amended, the administrator shall provide the student with written notice of the right to a hearing before the president or the president's designee.

The student shall provide the president or designee with written notice of their request for a hearing within five (5) business days of receiving the decision on their request to amend the record. The president or designee shall thereafter schedule a hearing at which the student may explain their reasons for requesting the amendment and present any written evidence they may have to support the request. Additional information regarding the hearing procedures will be provided to the student when notified of the right to a hearing.

Enforcement of Student Rights

Students who believe that Kenyon has violated their rights under the Family Educational Rights and Privacy Act may file a complaint with the U.S. Department of Education's Family Policy Compliance Office, 400 Maryland Avenue, SW, Washington, D.C. 20202.

Kenyon

Address
Gambier, Ohio 43022

Phone
740-427-5000

OUR PATH FORWARD
TO THE BICENTENNIAL

More than 18,407 Kenyon alumni, parents and friends have supported the campaign.

Join our Campaign (https://forward.kenyon.edu/)

Mr. Joseph W. Ambash
Seyfarth Shaw
World Trade Center East
Two Seaport Lane
Suite 300
Boston, Massachusetts 02210-2028

Dear Mr. Ambash:

This responds to your February 12, 2002, facsimile and recent conversation with (b) (6), (b) (7)(C). (b) (6), (b) (7)(C) of my staff asking for advice regarding the Family Educational Rights and Privacy Act (FERPA) as it relates to a request for information that the University of Massachusetts (University) has received from the Graduate Employee Organization, Local 2322, UAW (Union). As you are aware, this Office administers FERPA and is responsible for providing technical assistance to educational agencies and institutions regarding issues related to education records.

In your letter, you explain that part of the collective bargaining agreement between the Union and the University requires that the University disclose to the Union the following information on its graduate students: student ID number, social security number, waiver type, academic department, work department, employment category, number of hours contracted for, stipend, length of contract, entrance date, home address, phone number, and the fact that they may have been identified for lay-off. You explain that while the Union represents Teaching Assistants, Teaching Associates (graduate students who teach credit courses and whose names are listed in the schedule of courses), and Research Assistants, among others, the University has only defined Teaching Associates in its definition of directory information. You ask, therefore, whether the University may release the above outlined information on its Teaching and Research Assistants and Teaching Associates absent their prior written consent or absent a subpoena for such.

FERPA defines "education records" as "those records, files, documents and other materials which -

> (i) contain information directly related to a student; and
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. 1232g(a)(4)(1) and (ii). FERPA specifically includes in the term, those records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student. 34 CFR § 99.3 (b)(3)(ii). Therefore, under FERPA records of Teaching Assistants, Teaching Associates, and Research Assistants whose employment at the University is contingent of their status as students, are "education records," and, as such, are subject to the FERPA provisions authorizing their disclosure or nondisclosure.

With regard to the disclosure of education records, FERPA generally provides that an educational agency or institution may only disclose a student's education record to a third party if the eligible student has given appropriate written consent. 20 U.S.C. § 1232g(b)(1) and (b)(2)(A); 34 CFR § 99.30. FERPA does provide that written consent is not needed if the disclosure concerns information the educational agency or institution has designated as "directory information," under the conditions described in 34 CFR § 99.37. See 34 CFR § 99.31(a)(11). The definition lists items that would not generally be considered harmful or an invasion of privacy if disclosed which includes, but is not limited to: a student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; enrollment status (e.g. undergraduate or graduate; full-time or part-time); participation in officially recognized activities and sports; weight and height of members of athletic teams; dates of attendance; degrees and awards received; and the most previous educational agency or institution attended. 34 CFR § 99.3 ("Directory information").

We have advised in the past that a graduate fellow's/assistant's status as a graduate fellow/assistant and his/her teaching assignment may be designated as directory information, should an educational agency or institution so choose. This information is similar to those types of information that are specified by the statute under the definition of directory information and are of a nature of being common knowledge to those who are in the individual's class or who pass by the class. In this regard, if a school publishes and/or posts the names of teaching fellows/assistants with course selection or other registration information, it should be designating these two items as directory information.

You noted that the University has designated Teaching Associates as directory information. Accordingly, the names of those students who are Teaching Associates may be disclosed as directory information. However, as explained above, the records of a Teaching Associate are education records as defined under FERPA. Thus, as with all student education records, FERPA would prevent the University from disclosing information such as the student ID number, social security number, number of hours contracted for, stipend, length of contract, employment category and, entrance date to the Union absent another provision that allows for the disclosure. Other information requested by the Union, like home address and phone number may fit the definition of directory information under FERPA and could, if appropriately designated, be disclosed. As for the fact that a Teaching Associate may have been identified for a lay-off, that information would be protected from disclosure if such information is documented in a record at the University.

I trust that the above information is responsive to your inquiry. Should you have any further questions on FERPA, please feel free to contact this Office again.

Sincerely,

(b) (6), (b) (7)(C)
[redacted]
Family Policy Compliance Office

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-18-00

(UNFAIR LABOR PRACTICE)

GRADUATE TEACHING FELLOWS FEDERATION LOCAL 3544, AFT, AFL-CIO,	)	
Complainant,	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
v.	)	
OREGON UNIVERSITY SYSTEM (UNIVERSITY OF OREGON),	)	
Respondent.	)	

The Board heard oral argument on May 9, 2001, on Respondent's objections to a recommended decision by Administrative Law Judge (ALJ) Vickie Stilley-Cowan on January 11, 2001, following a hearing on October 9, 2000, in Eugene, Oregon. The hearing closed on November 13, 2000, upon receipt of the parties' post-hearing briefs.

Richard H. Schwarz, Executive Director, AFT-Oregon, 10725 S.W. Barbur Boulevard, Suite 50, Portland, Oregon 97219-8640, represented Complainant.

Kelliss Collins, Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

In early 2000, the Oregon University System, University of Oregon, (University) stopped providing to Graduate Teaching Fellows Federation (GTFF) information that enabled GTFF to verify the identity of bargaining unit members and their employment status. The parties' collective bargaining agreement specified the information to be provided to GTFF and when it was to be provided. On April 24, 2000, GTFF filed this unfair labor practice complaint alleging that the University violated ORS 243.672(1)(a), (e), (f), and (g)

by refusing to provide the GTFF with such information.[1] The University timely responded, denying portions of the complaint and asserting the affirmative defense that Article 3, Section 2, of the collective bargaining agreement was not enforceable because it was in direct conflict with the federal Family Educational Rights and Privacy Act (FERPA).

The issues presented are:

(1) Did the University violate the collective bargaining agreement and therefore ORS 243.672(1)(g), by failing to provide GTFF with the names and identification numbers of bargaining unit employees?

(2) Did the University commit an unlawful unilateral change during bargaining and deal directly with employees, in violation of ORS 243.672(1)(e)?

(3) Did the University violate ORS 243.672(1)(a) when it failed or refused to provide to the GTFF certain requested employment information?

The ALJ concluded that there was no (1)(a) violation, but that the University violated (1)(e) and (g). For the following reasons, we modify the recommended order, but agree that the University violated (1)(g) and (e).

Having the full record before it, this Board makes the following:

RULINGS

ALJ RULINGS

The ALJ deferred ruling on Exhibits C-11, C-12, C-13, C-14, C-15, C-16, C-17, and C-18, which are portions of collective bargaining agreements between certain University of California campuses and the Association of Student Employees, UAW. These exhibits are received into evidence as they provide some relevant information. The ALJ also deferred ruling on Exhibit R-1, a copy of a letter from the U.S. Department of Education to the Regents of the University of California; Exhibit R-8, a series of e-mails regarding contract negotiations; and Exhibit R-11, a letter of agreement between the parties. These exhibits are relevant and are received.

The ALJ's remaining rulings were reviewed and are correct.

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[1]GTFF later withdrew its claim that the University violated ORS 243.672(1)(f).

MOTION TO REOPEN RECORD

After the recommended decision was issued, on March 1, 2001, the University filed a motion to reopen the hearing record and motion for representation costs. The University sought to supplement the record with a letter from Leroy S. Rooker, Director of the Family Policy Compliance Office (Office) of the Department of Education (DOE) dated August 21, 2000. This letter had been previously provided to the American Federation of Teachers (AFT) in Washington, D.C., and concerned Rooker's opinion regarding FERPA and its application to the parties in this case. The University received this letter on January 24, 2001, in response to a letter it submitted to Rooker on September 15, 2000, asking for technical advice concerning FERPA and the GTFF. The University also moved for representation costs incurred for GTFF's failure to introduce the AFT letter earlier in these proceedings.

GTFF opposes the University's motions, arguing primarily that statements from the DOE regarding FERPA are already in the record and that Public Employee Collective Bargaining Act (PECBA) is controlling on the issues here—not FERPA. With respect to the motion for representation costs, GTFF additionally argues such costs should not be ordered until there is a prevailing party, that AFT is not its "parent," and GTFF was not in possession of the AFT letter at the time of hearing.

This Board reopens a record to receive additional evidence only upon a showing that such evidence is material to the issues and was unavailable at the time of hearing, or there was some other good and substantial reason the evidence was not presented at hearing. *Cascade Bargaining Council v. Bend-LaPine School District No. 1,* Case No. UP-33-97, 17 PECBR 609, 610 (1998). We conclude that the University has made such a showing in this case. The August 21 letter concerns the parties to this case and information pertinent to this dispute. The University did not receive this letter until after hearing. The University's motion to reopen the record is granted and the August 21 letter is received. The University's motion for representation costs is premature and therefore is denied. *See* OAR-115-35-055.

FINDINGS OF FACT

1. The GTFF, a labor organization, is the exclusive representative of a bargaining unit of graduate teaching fellows (GTF) employed by the University, a public employer.

2. In 1977, this Board certified GTFF as the exclusive representative of the bargaining unit of GTFs who teach classes or perform research, when those activities are *not required* for an advanced degree. *University of Oregon Graduate Teaching Fellows Federation v. University of Oregon,* Case No. C-207-75, 2 PECBR 1039, 1048 (1977). In 1998, this Board clarified the GTFF bargaining unit to include those GTFs who are involved in teaching or

research to fulfill a requirement for an advanced degree. *Graduate Teaching Fellows Federation, Local 3544, AFT, AFL-CIO v. University of Oregon*, Case No. UC-56-97.

3. The GTFF and University were parties to a collective bargaining agreement effective October 1, 1997 through March 31, 2000. Article 3, Section 2, of the agreement provided:

> "* * * Ten (10) working days before the start of each term, the University shall provide the Union with a list of all GTFs, both bargaining unit and non-bargaining unit, currently employed at the University. This list shall include name, social security number, department, and terms of appointment. The [GTFF] shall be notified at least monthly of all changes in employment status and rate or amount of pay. Additional lists and updates which shall provide such information as FTE, home address, bargaining unit status, rate of pay (annual salary base), and level (GTF I, II, III), terms of appointment and major shall be provided on a schedule (outlined in Appendix D) agreed upon jointly by the GTFF and the University and reviewed, reaffirmed, or revised at least once per academic year.
>
> "Addresses of GTFs provided by the University will be used by the GTFF only for the internal business of the Union. Social Security numbers will be used by the GTFF only for matters related to payroll deduction and insurance administration. The University will assume no liability for the unauthorized disclosure of this information to parties outside of the GTFF."

The parties' collective bargaining agreements have contained this provision, with minor modifications, since 1989. The basic requirement that the University provide GTFF with a list of GTFs within ten days of the beginning of each term has been in the parties' contract since 1978. Prior to this case, there had been no disputes about this article, and the University had provided the information required by the contract.

4. Appendix D of the collective bargaining agreement provides a schedule for the University to provide information to GTFF. That schedule generally coincides with the beginning of the academic terms.

5. Per the parties' collective bargaining agreement, insurance was available to bargaining unit members through a GTFF trust funded by the University. Each term the employer provided a list of employees, indicating additions, corrections, and deletions of employees since the preceding term. The GTFF benefits administrator, in turn, compared the

latest list from the University with the preceding list. Upon verification of the list, GTFF advised employees of their eligibility for participation in the insurance program. Those employees' names and identification numbers whose employment had ceased, or became otherwise ineligible, were forwarded by the GTFF benefits administrator to the insurance plan's COBRA administrator to provide appropriate COBRA notification. Names and identification numbers are necessary for GTFF to determine which individuals are eligible for insurance and which individuals needed COBRA notifications. Also, GTFF needs the names and identification numbers of the GTFs to know who is included in the bargaining unit.

6. Article 28 of the collective bargaining agreement provides:

"SEPARABILITY

> "Notwithstanding the provisions of ORS 243.702, Section 1, it is the expressed intent of the parties that in the event any provision of this Agreement shall at any time be declared invalid by any court of competent jurisdiction or rendered invalid through Federal or State regulation or decree, such decision shall not invalidate any remaining provisions of this Agreement. All other provisions not declared invalid shall remain in full force and effect unless mutually altered in writing. Upon the request of either party, both parties shall enter into negotiations for the purpose of attempting to arrive at a mutually satisfactory replacement for such invalidated provision."

7. In October 1999, the parties notified each other that they wished to open the contract for successor negotiations. Each provided the other with a list of topics and/or sections they wished to negotiate. The parties commenced negotiations in November 1999.

8. By letter dated December 2, 1999, GTFF requested certain information from the University regarding graduate students receiving training grants.

9. By letter dated January 21, 2000, the University provided some, but not all, of the information GTFF had requested.

10. By letter dated January 28, 2000, GTFF submitted an additional information request related to the bargaining unit, and the status and related information of employees.

11. In the February 2000 negotiation session, the University proposed to delete that portion of Article 3, Section 2, which provided "* * * both bargaining unit and

non-bargaining unit * * *," and substitute the phrase "identification number" in the place of "social security number." The use of identification numbers, rather than social security numbers, was already the understanding and practice of the parties.[2]

12. During this same bargaining session, the University referenced FERPA and indicated that there may be a problem with providing the information required under Article 3, Section 2. No further discussion took place at that time.[3]

13. By letter dated February 23, 2000, the University responded to GTFF's January 28 request for information regarding GTFs. The University refused to provide certain information and cited FERPA as its reason for no longer providing this information.

14. On February 23, 2000, the University submitted a proposal to change the provisions of Article 3, Section 2, to provide information only upon the individual written consent (waiver) of each of the represented employees.

15. At the conclusion of the February 23 bargaining session, Acting Dean of the Graduate School Marian Friestad stated her intention to require GTFs to sign a consent form in order for GTFF to receive the information specified in Article 3, Section 2.[4]

16. On or about February 24, 2000, the University notified bargaining unit members by general e-mail that they must complete a consent form indicating whether or not they wished their name and identification number to be released to GTFF before their employment agreements would be processed for the next term.

17. Of approximately 1,200 bargaining unit members, about 600 signed and returned the consent forms to the University.

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[2]In March 1999, the University changed its internal record-keeping procedures. It notified GTFF that, in future reports, an identification number chosen by the student, instead of a social security number, would be used; it may or may not be the actual social security number. Only the payroll office had access to the true social security number.

[3]Sometime before that, the University had received a copy of an opinion letter from the DOE to the Board of Regents of the University of California regarding the release of student information in relation to an organizing campaign. The letter set forth DOE's interpretation of FERPA with respect to the release of certain information. It was this opinion letter that precipitated the University to institute the changes at issue in this proceeding.

[4]The collective bargaining agreement had not yet expired as of the time the University took this action.

18. In addition, the University ceased providing names of employees in its transmission of payroll deduction of dues and fair share as required by Article 4, Section 3.[5] The University provided only lists of amounts deducted without any identification of the payer.

19. In March, GTFF offered to accept the University proposal of February 9 that would have replaced "social security number" with "identification number" in Article 3, Section 2. (Finding of Fact 11.) However, GTFF rejected the University's February 23 proposal to change the provisions of Article 3, Section 2, to require individual consent from each member of the bargaining unit before providing the information specified in that provision.

20. On or about March 20, 2000, GTFF filed a grievance asserting that the University had violated Article 3, Section 2, Appendix D, and the Letter of Agreement information requirements of the collective bargaining agreement. By letter dated April 24, 2000, the University denied the grievance.

21. On or about April 11, 2000, the parties reached agreement on all negotiable items except Article 3, Section 2. The parties signed a tentative agreement indicating that they agreed to negotiate Article 3 separately.

22. The University publishes directory information regarding all GTFs, excluding those individual employees who sign a restriction of directory information form. Directory information includes name, local and permanent addresses, telephone numbers, class level and type, academic major, dates of attendance, total credit hours, degrees and certificates awarded, honors awarded, and participation in officially recognized activities. This information is available to the campus community and general public through department lists, the University telephone directory, the library, and the University's internet site.

23. In the Reserve and Circulation Department of the University's library, the University maintains, among other things, a public information collection. That information includes, but is not limited to, a student profile report, faculty, staff and GTF salaries, the University budget, degree requirements for certain graduate programs, and various collective bargaining agreements between the Oregon University System and exclusive bargaining representatives (like GTFF). This information is available for review by the public, as well as University students, personnel, and alumni.

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[5]Article 4, Section 3, states: "The University will, in the month following the deduction, send payment to the Union for the total amount so deducted accompanied by a listing identifying the members for whom the deductions are being paid."

24. On September 15, 2000, the University sent a letter to the DOE requesting interpretive guidance on how the FERPA would apply in relation to the parties' collective bargaining obligations. As of the date of hearing, the DOE had not replied.

25. After hearing, on January 24, 2001, the University received a response to its September 15 letter from the DOE, in which DOE explains FERPA requirements with respect to student education records. According to DOE, the University may lawfully disclose the following "directory information" without consent of the student (or parent): student's name, address, electronic mail address, telephone listing, date and place of birth, major field of study, grade level, student status (part-time, full-time, graduate, undergraduate), teaching assignment (if any), participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. However, DOE concluded that the University may *not* disclose the following information to third parties without the consent of the student (or parent): social security number or identification number, rate of pay, and bargaining unit status.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

2. The University failed to provide information to GTFF, as required by Article 3 of the collective bargaining agreement, in violation of ORS 243.672(1)(g).

3. The University committed an unlawful unilateral change during bargaining and dealt directly with employees, in violation of ORS 243.672(1)(e).

4. The University did not violate ORS 243.672(1)(a) when it refused to provide to the GTFF certain requested employment information.

DISCUSSION

There is little factual dispute in this case. At the time this dispute arose, the parties' labor agreement required the University to provide GTFF with a list of bargaining unit and nonbargaining unit teaching fellows at least ten working days before the start of each term. (Article 3, Section 2, and Appendix D.) The University was required to include name, social security number (identification number), department, and terms of appointment. This information was used by GTFF to determine eligibility for participation in an insurance program funded by the University but largely administered by GTFF. GTFF also used this information to monitor membership, deduction of dues, and fair share.

After more than 20 years of regularly providing this type of information to GTFF, the University suddenly and unilaterally stopped doing so. The University admits that the collective bargaining agreement and the PECBA require the University to provide this information. The University also admits that it stopped providing the information, and that it directly contacted and requested GTFs to sign a consent form before it would release the information to GTFF.

GTFF alleges that these actions violated ORS 243.672(1)(a), (e), and (g). The University asserts, as an affirmative defense, that it was required to take these actions pursuant to federal law (FERPA). Respondent has the burden of proving its affirmative defense. OAR 115-10-070(5)(b); *Harrisburg Education Association v. Harrisburg School District #7*, Case No. UP-59-98, 18 PECBR 547, 556 (2000). The University asserts that Article 3, Section 2, and Appendix D concern a prohibited subject of bargaining because of FERPA requirements, and, therefore, are not enforceable. The University argues that pursuant to Article 28 (Separability) of the parties' agreement, the offending provisions of Article 3 are invalid.

(1)(G) CLAIM

The PECBA provides that it is an unfair labor practice for a public employer to violate the provisions of any written contract with respect to employment relations. ORS 243.672(1)(g).

The crux of this dispute surrounds the University's contractual obligations with GTFF.[6] GTFF alleges, and the University admits, that the University stopped providing some of the information required by Article 3, Section 2, and Appendix D of the collective bargaining agreement. There is no question, therefore, that the University violated the labor agreement. The University argues that it was required to take the action it did because FERPA makes the collective bargaining provisions at issue unlawful and unenforceable. The University also argues that it acted in accord with the separability provisions of the contract (Article 28). The question that we must decide, then, is whether there is an irreconcilable conflict between PECBA and FERPA that justified the University's actions here or excused it from complying with its contractual obligations. We conclude that there is not.

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[6]Although GTFF filed a grievance, we address the merits of the (1)(g) claim in this case. The University neither raised nor pled exhaustion of the grievance procedure, which is an affirmative defense. *Klamath County Peace Officers Assn. v. Klamath County*, Case No. UP-18-97, 17 PECBR 515, 516, n.3 (1998), *reconsid* 17 PECBR 579 (1998); *ATU v. Tri-Met*, Case No. UP-58/112-88, 11 PECBR 370, 380 (1989).

The purpose of FERPA is to provide parents, or students over the age of 18, access to the student's educational records and to restrict the release of that information to third parties. Specifically, FERPA prohibits the disclosure of "education records" to third parties without the written consent of the student. An institution's disclosure of education records may result in sanctions, including the withdrawal of all federal funding to the institution. 20 USC, Section 1232g provides:

> "(4)(A) For the purposes of this section, the term 'education records' means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—
>
> > "(i) contain information directly related to a student; and
> >
> > "(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.
>
> "(B) The term 'education records' does not include—
>
> > "* * * * *
> >
> > "(iii) in the case of persons who are employed by an educational agency or institution *but who are not in attendance at such agency or institution*, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose * * *." (Emphasis added.)

There are certain exceptions to the consent requirement of FERPA. One such exception concerns "directory information." 20 USC, Section 1232g. Pursuant to this section, an institution may disclose information falling within this term as long as it provides prior notice. More specifically, Section 1232g provides:

> "(5)(A) For the purposes of this section the term 'directory information' relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of

athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student."

FERPA regulations set forth specific enforcement procedures which allow an institution time and opportunities to correct any existing compliance problems with FERPA obligations. In other words, once a problem is identified, an educational agency or institution is not under the immediate threat of revocation of federal funds. FERPA regulations provide an explicit adjudicatory process for investigating, processing, and reviewing complaints that an institution is not meeting FERPA requirements. *See* 34 CFR, Part 99, Sections 99.60 through 99.67. This enforcement process includes the mandate that if an educational institution determines it cannot comply with FERPA, due to a conflict with State or local law, it "*shall* notify the [Federal Department of Education] within 45 days, giving the text and citation of the conflicting law." (34 CFR, Part 99, Section 99.61, emphasis added.)

The applicable regulations also delineate the obligations of the Office, the agency responsible for investigation, technical advice, and enforcement of FERPA. The Office investigates complaints to determine if an institution has failed to comply with FERPA. It provides notice to the institution of the complaint and an opportunity to submit a written response. The Office reviews the submissions and may permit further submissions by the parties. After its investigation, the Office provides the parties written notice of its findings and the basis for its findings. If the Office finds that the educational institution has not complied with FERPA, its notice to the parties: "(1)[i]ncludes a statement of the specific steps that the agency or institution must take to comply; and (2) [p]rovides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily." 34 CFR, Part 99, Section 99.66.

It is only after the completion of this process that the Office may take certain actions to compel compliance if the institution has not voluntarily complied within a reasonable period of time. 34 CFR, Part 99, Section 99.67.

In this case, the University acted not because of any final order pursuant to an adjudicatory process declaring that it was not in compliance with FERPA. Rather, in February 2000, the University received a copy of an advisory letter from the DOE to the *University of California* (UC). The letter responded to an inquiry from UC about what course of action it should take regarding the disclosure of student information in the context of a graduate student union representation petition. The California Public Employment Relations Board

sought, by way of subpoena, information regarding the proposed bargaining unit, and UC asked whether it would be in violation of the FERPA if it complied with the subpoena.[7]

Based on the UC letter, the University concluded that it would violate FERPA if it complied with its contractual obligations with GTFF and immediately ceased providing information to GTFF. The University did not notify the DOE, as required by FERPA regulations, or obtain an advisory opinion. It was only months later, after the commencement of this dispute, that the University contacted the Office for technical advice. Furthermore, there is no evidence that a complaint has been filed with the Office regarding the University's compliance with FERPA.

In defending against this complaint, the University argues that its actions are consistent with *Washington County Police Officers Assn. v. Washington County*, Case No. UP-42-92, 13 PECBR 627 (1992), *rev'd and remanded* 127 Or App 545, 873 P2d 432 (1994), *aff'd in part and rev'd in part* 321 Or 430, 900 P2d 483 (1995), and *Portland Fire Fighters Association, Local 43, IAAF v. City of Portland,* Case No. UP-99-94, 16 PECBR 245 (1995), *AWOP* 142 Or App 206, 920 P2d 181 (1996). In *Washington County* and *City of Portland,* unions filed complaints alleging, among other things, unlawful unilateral changes under ORS 243.762(1)(e). These cases do not support the University's conduct here; in fact, their holdings are inapposite.

In both *Washington County* and *City of Portland*, a *legal determination* had been made that a specific provision or policy was unlawful. In *Washington County*, this Board determined that certain county policies were in violation of the PECBA. Only *after* that determination did the county change its policies, as directed by this Board. It was the subsequent unilateral change in the policy which gave rise to a second complaint alleging an unlawful unilateral change. We determined that there was no unlawful unilateral change because an employer has no obligation to bargain over changes made to meet minimum legal requirements. Our decision was reversed on appeal. The reasoning of the Oregon courts bears repeating here. The Court of Appeals said:

> "To use ERB's example, an employer that wishes to cure its violation of the minimum wage law must comply with the minimum wage law *and* any bargaining duty imposed by ORS 243.672(1)(e). The minimum wage law does not require the employer to make unilateral policy changes in wages in order to attain compliance. In ERB's hypothetical, the employer's

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[7]FERPA does not contain a definition of "student." In the letter, the DOE determined that teaching assistants are students for purposes of FERPA and declined to determine the status of readers and tutors. Under the PECBA, GTFs are considered employees.

> conundrum is the result of its potential violation of both the minimum wage law and the bargaining law, and it cannot excuse its violation of one law by pointing to a perceived 'need' to violate the other. Employer's difficulties in achieving timely compliance with all applicable laws in this context may justify some adjustment of remedy by ERB, but they do not excuse employer from liability for violating its legal duties." *Washington County*, 127 Or App at 548, fn. 1.

The Oregon Supreme Court, accepting the above rationale of the Court of Appeals, added:

> "* * * The fact that two legal duties may collide, or appear in conflict, does not excuse an employer from making good faith efforts to comply with those duties, or excuse ERB from enforcing them. * * *" 321 Or at 439.

In *City of Portland*, the U.S. District Court determined that the City's failure to pay overtime to battalion chiefs was in violation of the Fair Labor Standards Act (FLSA). The City then changed its discipline policies *after* that determination to comply with the FLSA. The union objected to the subsequent changes because the City refused to bargain before implementing its new policy. This Board found that the City violated the PECBA by unilaterally changing the policy without first bargaining.

Washington County and *City of Portland* do not support the University's actions. To the contrary, these cases tell the University that potentially conflicting obligations do not excuse it from complying with PECBA requirements, nor us from enforcing the PECBA.

As mentioned above, in this case, there is not even a final order or decree that causes a collision between the University's PECBA and FERPA obligations. That is, there is no binding order or decree that the University can point to that indicates a direct and irreconcilable legal conflict. Rather, the University violated its existing contractual obligations here because of an opinion letter issued to parties in another state under different circumstances. Indeed, the University stopped providing student names to GTFF despite FERPA's express language that allows disclosure of student names without consent. *See* 20 USC, Section 1232g(5)(a).

Since that time, the University has received an opinion letter from DOE indicating that there are problems with the University's disclosure of certain limited information without individual consent. That is, the University has been told by DOE that, in order to be in compliance with FERPA, disclosure of a social security number or identification number, rate of pay, and bargaining unit status should not occur without the consent of the student. However, the University has made no attempt to comply with PECBA

or designated procedures under FERPA for reconciling these potential conflicts. The FERPA was enacted in 1974. Assuming that the University just discovered certain obligations under that law, that discovery does not constitute a business necessity or a bona fide emergency so as to excuse it from its obligations under the PECBA.[8]

The University also argues that the contractual provision at issue is a prohibited subject of bargaining, and therefore is unenforceable. The University claims that the separability article of the contract, Article 28, operates to invalidate and remove the offending article from the contract. We disagree.

A prohibited subject of bargaining is one which, if included in a collective bargaining agreement, would require either party to perform an unfair labor practice, violate law, or violate public policy. *Eugene Police Employees' Association v. City of Eugene*, Case No. UP-5-97, 17 PECBR 299, 303-304 (1997), *affirmed* 157 Or App 341, 972 P2d 1191 (1998), *rev den* 328 Or 418, 987 P2d 511 (1999). A subject is prohibited if it conflicts with a statute. *Greater Sweet Home Area Education Association v. Sweet Home School District*, Case No. C-114-81, 6 PECBR 4832 (1981). Article 28 of the parties' agreement provides that any time a provision of the agreement is "declared invalid by any court of competent jurisdiction or rendered invalid through Federal or State regulation or decree" the remainder of the agreement will remain intact, and the parties will negotiate to replace the invalidated provision.

As discussed above, there is no court decision, decree, or regulation rendering Article 3, Section 2, invalid. Rather, there is an opinion letter identifying certain problems for the University to solve. Article 28, by its plain language, simply does not apply to the existing set of circumstances. Obviously, the University needs to address the problems identified by the DOE's September 15 letter. However, it also must comply with its PECBA obligations. It has not followed the procedures available to it for ascertaining the scope of the problem, nor has it attempted to resolve the problems in a manner that is consistent with its PECBA obligations. Under these circumstances, we conclude that the provision at issue is not prohibited or invalid.

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[8]We do not minimize the University's need to address the problems identified in DOE's letter. However, in this case, the University acted without any serious attempt to reconcile potential conflicting legal obligations–and without the findings and conclusions of any formal, adjudicatory process. The University cannot simply pick and choose one legal obligation over another. GTFF has legitimate PECBA rights and interests in information that allows it to verify its members and their eligibility for benefits and appropriate dues deductions.

(1)(E) CLAIM[9]

It is an unfair labor practice for an employer to unilaterally change a mandatory subject of bargaining while the employer has a duty to bargain and prior to the exhaustion of the statutory dispute resolution process. *AFSCME v. Wasco County,* Case No. C-176-75, 4 PECBR 2397, 2400 (1979), *affirmed* 46 Or App 859, 613 P2d 1067 (1980).[10] In addition, as a part of its good faith bargaining duty, an employer is prohibited from bypassing the exclusive representative and dealing directly with the bargaining unit members. *Cascade Unified Education Association/OEA/NEA v. Cascade School District No. 5,* Case No. UP-31-98, 18 PECBR 590, 602 (2000).

GTFF alleges that the University violated (1)(e) when it unilaterally stopped providing the disputed information and when it directly contacted its members to gain their consent for disclosure. The University raises the same defenses as those identified above for justifying its actions.

At the time the University acted, the parties had commenced bargaining for a successor agreement. The University had opened Article 3, Section 2, and had submitted proposals to change that article. GTFF had submitted a counterproposal accepting, in part, some proposed changes. The parties had not completed bargaining or the dispute resolution process when the University unilaterally stopped providing the information to GTFF and directly contacted bargaining unit members. Under these circumstances, the University's actions also violated (1)(e).

(1)(A) CLAIM

ORS 243.672(1)(a) provides that it is an unfair labor practice for a public employer to interfere with, restrain, or coerce employees *in* or *because of* the exercise of their PECBA rights as guaranteed in ORS 243.662.

"BECAUSE OF" CLAIM

GTFF alleges that the University's refusal to provide the disputed employee information interfered with, restrained, or coerced bargaining unit members' access of their

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[9]ORS 243.672(1)(e) provides that it is an unfair labor practice for an employer to "[r]efuse to bargain collectively in good faith with the exclusive representative."

[10]For a complete history of this case, *see*: *AFSCME v. Wasco County,* Case No. C-176-75, 1 PECBR 637 (1976), *ruling on reconsideration* 1 PECBR 728 (1976), *rev'd and remanded* 30 Or App 863, 569 P2d 15 (1977), *order on remand* 4 PECBR 2397 (1979), *affirmed* 46 Or App 859, 613 P2d 1067 (1980).

contractual benefits and interfered with GTFF's representation of those bargaining unit members.

In analyzing a "because of" subsection (1)(a) claim, this Board must determine whether the employer acted "because of" an employee's exercise of PECBA rights. Our focus in subsection (1)(a) "because of" claim is the *reason* the employer did what it did. *Amalgamated Transit Union (ATU) v. Tri-County Metropolitan Transit District (Tri-Met)*, Case No. UP-48-97, 17 PECBR 780 (1998). If after weighing all the evidence, we determine that the employer's reason was unlawful, complainant prevails. If we determine that the employer's reason was legitimate, respondent prevails. Here, we must decide why the University refused to provide certain information to GTFF and required individual consents from its members.

The evidence produced at hearing is undisputed concerning the reason for the University's action. The University took the action it did because it believed it was required to do so by FERPA. As described above, the University acquired an opinion letter from the DOE that convinced it that FERPA prohibits the release of certain education records to third parties without the explicit written consent of the student. Whether the University's determination is *legally* correct or not, for purposes of our subsection (1)(a) analysis, it is enough. The University established that it took the action because it believed it was required to do so by federal law. GTFF did not prove that this belief was pretext. In other words, the University's reason for its action was *not* to interfere with, restrain, or coerce employees in the exercise of PECBA rights.

"IN" CLAIM

In analyzing an "in" subsection (1)(a) claim, we determine whether the natural and probable effect of the employer's conduct would tend to interfere with, restrain, and coerce employees in the exercise of their PECBA rights. Neither anti-union motivation, nor actual interference, restraint, or coercion need be proven. In addition, neither the *possible* effect of the employer's actions, nor the *subjective* impressions of employees establish a violation. *ATU v. Tri-Met*, 17 PECBR at 789.

There are two types of "in" violations: those that are derived from a "because of" violation and those that arise independently. Having determined that there was no "because of" violation, we conclude there was no derivative "in" violation.

In an independent "in" allegation, this Board will find a violation if the natural and probable effect of the employer's actions, viewed under the totality of circumstances, would tend to interfere with the employee's exercise of protected rights. *OPEU and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 521 (1988).

The University's notice to the GTFs provided that a GTF had the *option* of either authorizing the University to release information to GTFF or not authorizing the release of information. The University stated the FERPA as the reason for this requirement and informed GTFs that their employment contracts would not be processed if they left the form blank. They were not threatened with a loss of their position if they chose not to release information. In fact, approximately 600 of the 1,200 GTFs did not return the form. We conclude that a reasonable person, under these circumstances, would not have been reluctant to pursue a PECBA protected right based on the actions of the University. We will dismiss the subsection (1)(a) allegation.[11]

ORDER

1. The University shall cease and desist from refusing to provide GTFF with information in violation of the collective bargaining agreement and ORS 243.672(1)(g).

2. The University shall cease and desist from unilaterally refusing to provide information and directly contacting bargaining unit members, in violation of ORS 243.672(1)(e).

3. The subsection (1)(a) allegation is dismissed.

DATED this 17th day of October 2001.

David W. Stiteler, Chair

Rita E. Thomas, Board Member

Kathryn T. Whalen, Board Member

This Order may be appealed pursuant to ORS 183.482.

[11]GTFF did not assert that the University's conduct violated (1)(b), which prohibits an employer from interfering in the administration of a labor organization.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

KENYON COLLEGE EMPLOYER, and KENYON STUDENT WORKERS, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) PETITIONER.	)	CASE 08-RC-284759

REPLY IN SUPPORT OF MOTION TO DISMISS
OR, IN THE ALTERNATIVE, STAY RC PETITION

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INTRODUCTION

The Union cascades a litany of flawed theories to support its strawman arguments.

Kenyon never argued that FERPA deprives the NLRB of its statutory authority. It does not. But the NLRB must stay the Petition to address the conflict that it viewed as hypothetical in 2015 because students were not "employees" under the NLRA. The issue is no longer hypothetical. The NLRB must reconcile its Election Rule with FERPA's student privacy protections, which Congress placed "above the federal government's interest in obtaining necessary data and records." *United States v. Miami Univ.*, 294 F.3d 797, 807 (6th Cir. 2002). Although the Union gives those student privacy interests no weight at all, the Board cannot be so cavalier.

The Union argues that FERPA permits Kenyon to disclose its students' education records, even without written consent from each student worker or a subpoena. It does not, as the country's leading FERPA expert explains (Ex. A, Declaration of LeRoy Rooker). The Union is wrong that Kenyon can deem Election Rule information to be unprotected "directory information" when it is not. The Union is wrong to equate the non-consensual disclosure of 600 students' education records with isolated, inadvertent disclosures that do not violate FERPA. The Union is wrong that FERPA compliance is optional and its consequences modest. And the Union is reckless in arguing that FERPA compliance is a mere "funding preference," as declining federal funding to sidestep FERPA would jeopardize the work-study programs and Pell Grants that financially assist the very students the Union seeks to represent.

The Union next belabors its view that Kenyon student workers are "common law" employees—as if that resolves whether they are NLRA "statutory employees." It does not, as *Columbia* held. *The Trustees of Columbia Univ.*, 364 NLRB No. 90 (2016). Kenyon's Motion does not turn on whether its students are common-law employees. Instead, Kenyon assumed that fact-intensive point, but explained why the Board should decline jurisdiction anyway. The Union

does not acknowledge, much less respond to, Board precedent declining to find statutory employee status where, as here, "working conditions are not typical of private sector working conditions." *Goodwill Indus. of Tidewater, Inc.*, 304 NLRB 767, 768 (1991). The Union ignores its own admissions that students' "working conditions" are their "*learning conditions*" and that *all* student jobs have an "educational component"—indisputably making them unlike "typical" employees. And the Union fails to address the reality that recognizing a unit of Kenyon students would undermine Section 7's guarantee of free choice for or against union representation.

ARGUMENT

I. THE UNION MISUNDERSTANDS FERPA AND IGNORES STUDENT PRIVACY.

The Union misrepresents Kenyon's arguments, misstates how FERPA works, and ignores critically important student privacy interests. Kenyon is not, as the Union claims, hiding behind a mere "funding preference" to seek dismissal of the Petition; Kenyon did not argue that FERPA requires dismissal. Instead, Kenyon argues that student privacy interests require a *stay* until the NLRB reconciles its *administrative* election rules with FERPA's *federal statutory* requirements.

The Union seems to believe that the NLRB and Kenyon can just ignore FERPA primacy and student privacy. The Union's position is as wrong as it is troubling.

First, while the Union ignores student privacy rights entirely, Kenyon is not free to ignore them or to subjugate them to the Election Rule. "Congress holds student privacy interests in such high regard" that "educational institutions may withhold from *the federal government* certain personal data on students and families." *United States v. Miami Univ.*, 294 F.3d at 806–07 (emphasis in original). "In other words, Congress places the privacy interests of students and parents above the federal government's interest in obtaining necessary data and records." *Id*. at 807. The Union ignores this, contending that FERPA is no more than "the funding preferences of a private university." Opp. at 2. But FERPA is not merely a preference: it is a federal statute

reflecting congressional policy to protect student privacy. Kenyon cannot violate that federal *statute* to satisfy an agency *rule*, nor can it treat student privacy as cavalierly as the Union does. Kenyon scrupulously observes its FERPA obligations regardless of who is seeking student information. *E.g.*, *Doe v. Kenyon College*, Case No. 2:20-cv-4972 (S.D. Oh. July 22, 2021).

Second, the Union misrepresents that Kenyon can simply disclose its students' records as "directory information." Not so. The disclosures required under the NLRB Initial List, *i.e.*, "the full names, work locations, shifts and job classifications of all individuals in the proposed unit," 29 CFR § 102.63(b)(1)(i)(C), do not all qualify as FERPA "directory information." LeRoy Rooker, the former Director of the Department of Education's Family Policy Compliance Office and the country's leading expert on FERPA compliance, confirms this point. Ex. A at ¶¶ 2, 10–11, 16. Nor does all the information required in the Voter Lists constitute "directory information" that may be disclosed. *Id*. at ¶ 17. Even the DOE guidance letter that the Union cites (which Mr. Rooker wrote) *expressly rejects* the Union's position, confirming that "*FERPA would prevent the University from disclosing* information such as the student ID number, social security number, *number of hours contracted for*, stipend, length of contract, *employment category* and[] entrance date to the Union." Opp., Ex. 6 (emphasis added).

Third, the Union cannot answer the fact that FERPA prevents Kenyon from complying with the Election Rule without the express consent of the 600 students the Union seeks to represent or a lawfully issued subpoena. Ex. A at ¶¶ 6, 8–9, 12. It argues that Kenyon's current FERPA "directory information" notice suffices as consent, but the notice does not cover the details the Rule requires. *Id.* The Union's idea that Kenyon drafted its longstanding FERPA policies to exclude NLRB disclosures and thwart student organizing is just nonsense; until very recently, the Union agreed that students could not organize under the Act. Ex. B (June 1, 2021 UE Article)

(undergraduate students cannot rely on the NLRB's election processes).

Fourth, while accusing Kenyon of inaction,[1] the Union has apparently done nothing to obtain consent from the 600 students in its proposed unit to disclose their education records to the NLRB and Union. While the Union claims that it secured authorization cards from at least a third of those students, it apparently took no steps to secure, then or at any other time, their consent to releasing their records in the representation case that the Union invoked based on those cards.

Fifth, the Union also illogically argues that disclosing 600 student education records to *both* the NLRB and the Union, without consent, would only be one disclosure, not a "policy or practice" of releasing FERPA protected information. Its cases provide no support for that position; they all discuss the consequences of "single," "individual," or "isolated" FERPA violations. *Com. v. Buccella*, 434 Mass. 473, 483 n.8 (2001); *Ellis v. Cleveland Mun. Sch. Dist*., 309 F. Supp. 2d 1019, 1023 (N.D. Ohio 2004); *Achman v. Chicago Lakes Indep. Sch. Dist. No. 2144*, 45 F. Supp. 2d 664, 674 (D. Minn. 1999). None address an intentional release of *hundreds* of students' records. There is no doubt that "intentionally disclosing information about dozens or hundreds of students, even if done at the same time, would indicate that the institution has a policy or practice of disclosing protected information." Ex. A ¶ 6.

Sixth, the Union argues that Kenyon could have easily avoided the FERPA conflict by being prescient enough about the timing of the Petition to simply forego federal funding, crudely equating the college's federal funding in *support of student workers* to the whims of a hypothetical "anti-worker billionaire." Opp. 31. This ludicrous suggestion disregards how private colleges like Kenyon operate. Few reject federal funding, because it is essential to support students' educations

[1] The Union faults Kenyon for not seeking an advisory opinion from the DOE before it knew about the Election Petition. But the regulation that the Union cites only requires notice to the DOE if a college "determines that it cannot comply with the Act . . . *due to a conflict with State or local law*." Opp. at 35–35. That's not this case. Even if it was, the regulation just requires notice, not pursuit of an opinion letter.

with Pell Grants and work study programs. Foregoing funding would threaten the viability of many student positions. The Union seems to have no concern at all about the consequences of eliminating federal funding on the very programs that support the students it seeks to represent.

Finally, the Union minimizes the consequences of violating a federal statute. Integrity and privacy concerns aside, violating FERPA can have serious consequences. The DOE may enforce FERPA by depriving an institution of federal funding—the very funds that colleges use for work study and Pell Grants that often helps the least advantaged students finance their educations. Ex. A ¶ 19. That's not the end of it: the DOE can also seek injunctive relief against non-complying institutions. *See, e.g.*, *United States v. Miami Univ*., 294 F.3d at 806–07.

Without student consents or a lawfully-issued subpoena, neither Kenyon nor the NLRB can cast aside FERPA and the student privacy interests it protects.

II. THE BOARD MUST DISMISS THE PETITION BECAUSE KENYON'S STUDENT WORKERS ARE NOT STATUTORY EMPLOYEES, AND TREATING THEM AS SUCH WOULD NOT SERVE THE ACT'S POLICIES.

A. The Union Does Not Seriously Dispute that Kenyon's Student Workers Are Unlike the Typical Employees that the NLRA Covers.

The Union argues that Kenyon's student workers are common-law employees and therefore statutory employees. That premise is wrong—many, if not all, of Kenyon's student workers do not qualify as common-law employees. But even assuming, as Kenyon's Motion did, *see* Motion at 10, that students are common-law employees, that does not establish that they are *statutory* employees. The Board is not "required to find workers to be statutory employees whenever they are common-law employees." *Columbia*, 364 NLRB No. 90, at *5.

The Board has long held that common-law employees are not statutory employees where their "working conditions are not typical of private sector working conditions," in that "the relationship is [not] guided to a great extent by business considerations" and cannot "be

characterized as a typically industrial relationship." *Goodwill*, 304 NLRB at 768. The Union does not, and cannot, distinguish *Goodwill*. That is because virtually all of the facts the Union relies on to argue that Kenyon's student workers are statutory employees were also present in *Goodwill*. The workers were "subject to supervision by other employees of the employer"; were "only compensated for time worked"; were "subject to discipline and termination for specified offenses"; and had to coordinate hours and time off with supervisors. Opp. at 13–14; *see* 304 NLRB at 768. None of these facts were adequate in *Goodwill* to render the workers statutory employees.

Nor does the Union address in any way the "significant differences" in Kenyon's relationship with its student workers as compared to its employees. *Id.* at 768. In *Goodwill*, it was precisely those differences that most clearly demonstrated that only a subset were statutory employees. *Id*. The Union's emphasis on President Decatur's statement that "[t]here's a traditional employer-employee component to" student work is therefore misplaced. Acknowledging such a "component" does not imply that student workers are statutory employees, if other non-traditional components of the relationship are far more substantial. The Union conveniently omits other aspects of President Decatur's statement, in which he distinguished *graduate student employment* from the undergraduate work that is central to Kenyon students' financial aid. *See* Opp., Ex. B. President Decatur has consistently articulated "that the fundamental relationship a college has with its students is educational, and that campus work exists to further that education and make it financially accessible to students across incomes." Ex. C (May 5, 2021 Message from President Decatur).

In any event, the Union cannot deny that Kenyon's student workers have a fundamentally different relationship with the college than its *employees* do. Only those differences could justify the Union's decision to limit its proposed bargaining unit to *student workers*—who come to

Kenyon for an *education*, not a job, and whose "working conditions" are admittedly their "*learning conditions*." Motion, Ex. B. If the student workers were in fact like the college's *employees*—who come to Kenyon for a *job*, not an education, and whose working conditions are just that—there would be no basis for the Union's decision to limit its unit only to undergraduate *students*.[2]

B. Neither *Columbia* Nor The Union's Other Authorities Is Dispositive Here.

Ignoring *Goodwill*, the Union cites *Columbia* as holding that all students who are common-law employees are statutory employees. But *Columbia* expressly declined to so hold: "We *do not hold* that the Board is required to find workers to be statutory employees whenever they are common-law employees, but only that the Board may and should find *here* that student assistants are statutory employees." 364 NLRB No. 90, at *5 (emphasis added).

The Union cannot overcome the dispositive differences between Kenyon's undergraduate workers and Columbia's mostly-graduate teaching assistants, whom the Board deemed both common law and statutory employees based on those particular facts. Specifically, the graduate students had already completed their undergraduate studies, regularly worked for five to nine years, performed "work advanc[ing] a key business operation of the University," and provided substantial economic benefits to the school. *Id.* at *17. None of those facts exist here.[3]

[2] Although the Motion did not seek dismissal on the basis that the proposed unit is inappropriate, a matter that would require a hearing, the Union nonetheless presents the make-weight argument that its proposed "wall-to-wall" unit is presumptively appropriate as "an employer-wide unit." Wrong again. The Union seeks to represent a unit of *student workers only*. It does not seek to represent *all of Kenyon's employees* working in the same departments as those student workers. A unit seeking to represent a subset of workers across a range of departments, with widely variable responsibilities, hours, and supervision, is not presumptively appropriate. *See, e.g.*, *Turner Indus. Grp., LLC*, 349 NLRB 428, 435 (2007) (no presumption where proposed unit included only a subset of workers in each facility).

[3] The Union also briefly references *University of Chicago*, Case No. 13-RC-198365 (Region 13, May 23, 2017), and a related case, *Univ. of Chicago v. Nat'l Lab. Rels. Bd.*, 944 F.3d 694 (7th Cir. 2019), each of which address a proposed unit of student workers in the university's library. As in *Columbia*, however, the group of workers at issue were a mixture of graduate and undergraduate workers who all worked in similar positions. *See, e.g.*, *University of Chicago*, Case No. 13-RC-198365 (Region 13, May 23, 2017).

To be sure, under *Columbia*, "an employee who works for a business that happens to be a college or university, and is also a student there, does not lose" the Act's protections. Opp. at 11–12. If an employee in Kenyon's existing bargaining units *happened* to also be a student, then that employee might properly remain in the unit. But that says nothing about this situation, where the proposed unit is composed *entirely* of undergraduate students holding positions that Kenyon created just for them, that *only* Kenyon undergraduates can hold, that are *not* like "typical" positions that Kenyon offers its regular employees, and that *all admittedly* have some educational component.[4] Even if Kenyon's student workers are common-law employees, the Act does not govern their relationship with their education provider because it is too far afield from the typical employment relationship. *See Goodwill*, 304 NLRB at 768.

None of the Union's other authorities require a different conclusion. The Union cites two Regional actions and a General Counsel memorandum that was rescinded and then reinstated. The RD's decision in *Grinnell College*, Case No. 18-RC-228797 (Region 18, November 5, 2018), can bear virtually no precedential weight, because the union withdrew its petition to avoid having the Board decide whether undergraduate student workers are statutory employees. *Hamilton College* involved a *stipulated* election agreement for an election in one department, not an NLRB decision on statutory employee status. *See Hamilton College*, Case No. 03-RC-281779. And the GC Memorandum simply explains the prosecutorial position of the current General Counsel; it is not binding law and cannot supersede Board decisions.

[4] The Union attempts to backtrack on its prior admissions that "Kenyon student workers agree that all of our jobs have some kind of educational component," *see* Motion, Ex. D, by claiming that students often hold positions unrelated to their majors. Opp. at 19. But asking whether a position is related to a student's major is far too narrow a lens—education at Kenyon goes well beyond a student's major, and the College *requires* students to take courses outside their major to graduate, and most take *more* classes outside their major than within it. *See* Ex. D (https://www kenyon.edu/offices-and-services/registrar/kenyon-college-course-catalog/academic-policies-and-procedures/requirements-for-the-degree/#credits). That a given position might be unrelated to a student's major does not make the position any less educational.

C. The Union Has No Answer to the Important NLRA Policies At Stake.

The Union also fails to recognize that the Board does not always exercise jurisdiction over statutory employees. "[E]ven when the Board has the statutory authority to act . . . 'the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.'" *Northwestern Univ.*, 362 NLRB 1350, 1352 (2015). The Union dismisses *Northwestern* as irrelevant because it did not "decid[e] whether the football players involved were 'employees' under the Act." Opp. at 22. But that is precisely the point—the Board found it unnecessary to determine whether the undergraduate students there were statutory employees because it would decline to exercise jurisdiction *either way*.

Here, even if the Board *could* exercise statutory jurisdiction over the proposed unit, it has the discretion to decline to do so—something the Union fails to address. The Union also ignores the fundamental concern that exercising jurisdiction here would undermine the NLRA's policy of supporting workers' "'full' freedom to express a choice for or against collective-bargaining representation." *Columbia*, 364 NLRB No. 90, at *7. Kenyon's student worker population turns over constantly: student positions often change from semester-to-semester and year-to-year, about 25% of Kenyon's student workers leave each year at graduation, about a third of the proposed unit works less than four hours a week, and student workers' hours are limited and often irregular. These facts make it impossible to define a stable and appropriate bargaining unit or to guarantee that, on any particular election date, a majority of workers have had the full freedom to express their choice, since it is guaranteed that the unit's composition will have materially changed a month, semester or academic year later. That scenario defeats the Act's fundamental policy of protecting Section 7's guarantee of free choice for or against collective representation. *See San Francisco Art Institute*, 226 NLRB 1251, 1252 (1976) (it would "not effectuate the policies of the Act" to assert jurisdiction over students given, *inter alia*, "the brief nature" of their "employment tenure").

The Union's only response is to blame Kenyon for delaying an election and point to employee turnover in *Columbia*. This response completely misses the point. Where the proposed unit consists only of undergraduates, constant turnover will always impede free choice in an election at a snapshot in time in a random week in a random semester. While the Board was not troubled by the turnover in *Columbia*, there, most graduate assistants worked regularly for five to nine years and a relative handful of undergraduate students had shorter tenures. Their relatively short tenure pales in comparison to the *constant* turnover among *all* Kenyon student workers.

III. THE BOARD SHOULD RESOLVE THESE IMPORTANT ISSUES PRIOR TO ANY HEARING.

If the Region decides to exercise jurisdiction, further proceedings should be stayed to allow Kenyon to seek Board review prior to any hearing or election. The jurisdictional question here is complex and novel. Proceeding to a hearing on unit appropriateness and a possible election, prior to resolving this question, risks wasting resources, having ballots go uncounted pending review, and further undermining free choice among an ever-changing population of short-term workers.

The Union's only response is that there "is no basis for finding that the hearing would be long and expensive." Opp. at 24. That ignores reality. The proposed unit includes over 100 different positions across approximately 50 different departments, with wide variation in supervision, responsibilities, work schedules, compensation, and more. Adducing evidence on all of these positions will be necessary under the fact-intensive community of interest standard, to avoid the failures of proof like those the RD cited in *Grinnell College*, D&DE, Case No. 18-RC-228797, at *10, 11 (Region 18, Nov. 5, 2018). To ensure that the Board has adequate evidence on these issues, a hearing will necessarily be long and expensive.

CONCLUSION

For the foregoing reasons, the Board should dismiss the petition or, alternatively, stay it.

Dated: November 24, 2021

Respectfully Submitted,

*/s/ Jacqueline M. Holmes*_____

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CERTIFICATE OF SERVICE

I hereby certify that on this day, November 24, 2021, a true and correct copy of the foregoing Reply in Support of Motion To Dismiss, Or In The Alternative, Stay RC Petition was served via e-mail addressed as follows:

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/s/ Jacqueline M. Holmes

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

KENYON COLLEGE EMPLOYER, and KENYON STUDENT WORKERS, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) PETITIONER.	)	CASE 08-RC-284759

DECLARATION OF LEROY S. ROOKER

I, LeRoy S. Rooker, declare and state as follows:

1. I make this statement based on my personal knowledge and in my personal capacity. If called as a witness, I could and would competently testify to the facts, opinions, and conclusions contained in this Declaration.

2. I served for twenty-one (21) years as the director of the Department of Education's Family Policy Compliance Office ("FPCO"), which at the time was the office within the Department of Education responsible for administering the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. In this position, I was responsible for developing the Department of Education's FERPA-related policies, including policies regarding FERPA enforcement; for drafting regulations interpreting FERPA; and for answering questions from regulated parties about FERPA's application, both orally and in informal letter opinions.

3. As a result of my work at the Department of Education, I am widely considered to be the nation's leading authority on FERPA. I currently provide FERPA-consulting services to entities that require assistance interpreting and applying FERPA.

4. The purpose of FERPA is twofold: to ensure that students (and their parents) have prompt access to their own education records, and to ensure that the privacy of those records is protected from unauthorized disclosure to others. Student privacy is the principal consideration in determining whether and under what circumstances FERPA permits disclosure of student education records to individuals or entities other than the student to whom they apply.

5. FERPA provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information," subject to specified exceptions. 20 U.S.C. § 1232g(b)(2).

6. While isolated, inadvertent disclosures—such as the mistaken disclosure of a single student's information—do not demonstrate a "policy or practice" of releasing information in violation of FERPA, intentionally disclosing information about dozens or hundreds of students, even if done at the same time, would indicate that the institution has a policy or practice of disclosing protected information.

7. FERPA protects "information in education records." Under the relevant regulations, "education records" include "[r]ecords relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student." 34 CFR § 99.3(b)(3)(ii). Consequently, work records related to students who work at the institution they attend are protected from disclosure by FERPA where their work status is conditioned on their attendance at the institution. Protected information includes (a) the fact that a student is working

for the college or university; (b) the student's work assignment; (c) information about when and where the student works; (d) information about the student's work performance; (e) information about how the particular student is compensated; and (f) any other personally identifiable information in the student's work record.

8. There are four principal circumstances in which an institution may disclose student education records: (a) if the student (or, in the case of a minor student, his or her parent) consents in writing; (b) if the information is directory information, and the institution has previously provided both notice of the specific items it has designated as directory information and an opportunity to opt out of any disclosure of directory information; (c) in response to a lawfully issued subpoena, after providing notice to the affected student(s) and giving them an opportunity to take protective action; and (d) other specifically enumerated statutory exceptions set forth in 20 U.S.C. § 1232g(b)(1).

9. An institution may disclose student education records if it has the student's written consent to do so. 20 U.S.C. § 1232g(b)(1), (b)(2)(A); 34 CFR § 99.30. The other three circumstances set forth in paragraph 8, above, are exceptions to this consent requirement.

10. One exception to the written consent requirement is for information classified as "directory information." An institution may choose to define the particular "directory information" items, including for example the student's name, address, telephone listing, date and place of birth, major field of study, participation in sports and other university-sanctioned activities, enrollment status, and dates of attendance, as "directory information" that may be subject to disclosure. To do this, the institution is required to give advance notice concerning the particular items it has designated as "directory information" and allow students an opportunity to opt out of having their individual information disclosed. Information that an institution classifies

as "directory information" may be disclosed only if these steps have been taken, and only concerning those students who have not opted out of the disclosure.

11. The disclosure exception for directory information is limited, and a covered institution is not permitted to classify all aspects of an education record, or a student work record, as directory information. For example, information about the student's specific work location, work responsibilities, work shifts, and work performance are not appropriately classified as directory information.

12. Another exception to FERPA's written consent requirement is that information may be disclosed under certain conditions in response to a lawfully issued subpoena. Upon receiving a subpoena that seeks information protected by FERPA, the institution is required to provide specific notice to each affected student notifying him or her of the subpoena requirements, and must provide the student a reasonable opportunity to take protective action before the institution may release that student's records pursuant to the subpoena. The statute and regulations do not provide a specific definition of what constitutes a reasonable opportunity to object. In my experience, the Department of Education looks at the totality of the circumstances to determine what is reasonable, with the goal of ensuring that students have sufficient time to object to any disclosure of their private education records.

13. The third category of exceptions to FERPA's written consent requirement is a specific, statutorily prescribed list of exemptions contained in 20 U.S.C. § 1232g(b)(1).

14. I have reviewed the disclosure requirements set forth in the National Labor Relations Board's Election Rules published at 29 CFR §§ 102.63 and 102.67. From this review, I understand that those rules require an institution to disclose the following information regarding each worker in the group of individuals the union wishes to represent: (a) the

individual's name (which necessarily discloses his or her status as a worker); (b) the individual's job title; (c) the individual's work location; and (d) the specific shifts the individual works. All of this information, insofar as it involves student workers, represents covered education records under FERPA, and thus may be disclosed only with signed consent or if the information falls within one of the exceptions to signed consent discussed above. This information is not covered by the exceptions to written consent set forth in paragraph (b)(1) of FERPA, 20 U.S.C. § 1232g(b)(1).

15. An institution could disclose the information that the NLRB's election rules require if it had written consent from each student whose information was to be disclosed. 20 U.S.C. § 1232g(b)(1), (b)(2)(A); 34 CFR § 99.30.

16. I have also reviewed Kenyon College's policy regarding disclosure of directory information. This policy explains that "[p]ublic directory information (i.e., name, class year, email address, advisor, majors, minors, concentrations, degree in progress or degree awarded, dates of attendance, date of graduation, honors and awards, high school attended, and similar information) is available to the public unless the student expressly prohibits their publication." None of the information that the NLRB rules require be disclosed falls within the items designated as directory information by Kenyon College. Although Kenyon designates student names as directory information, providing a list of names of student workers would link those names to the individual's status as a worker, which is not directory information. FERPA does not allow an institution to link directory information to non-directory information in any disclosure. Furthermore, information about an individual's specific work location and work shift would not qualify as directory information even if the institution had defined it as such. Therefore, an institution may not disclose this information as directory information.

17. I have also reviewed the provisions of the NLRB Election Rules that require disclosure of "home addresses, available personal email addresses, and available home and personal cellular 'cell' telephone numbers" of the individuals the union seeks to represent. 29 CFR § 102.67(l). With the exception of "personal email addresses," none of this information falls within Kenyon College's current definition of directory information that may be disclosed outside the College, and therefore Kenyon could not disclose it as such. Although Kenyon has designated the student's "home address" and "campus address" as information that may be disclosed "to students and employees with Kenyon network accounts," the applicable regulations would prevent Kenyon from disclosing this address information to anyone without a Kenyon network account. Specifically, 34 CFR 99.37(d) provides that an institution "may specify that disclosure of directory information will be limited to specific parties" and that, where it does so, the institution "must limit its directory information disclosures to those specified in its public notice . . ."

18. Because Kenyon cannot disclose the information that the NLRB's regulations require it to disclose as directory information, it may disclose the information only pursuant to written consent (as noted in Paragraph 15, above), or pursuant to a lawfully issued subpoena. As noted above (*see* Paragraph 12), information may be disclosed in response to a lawfully issued subpoena only after the institution provides specific notice to each student explaining that his or her information is the subject of the subpoena, and provides the student a reasonable opportunity to take protective action. It is critical to fulfilling FERPA's mission of protecting student privacy that students be given sufficient time to review the disclosure notice, and a full opportunity to object to the disclosure.

19. The Department of Education may enforce FERPA's requirements by depriving an institution that has a policy or practice of violating FERPA of federal funding for its programs. This includes all federal funding administered by the Secretary of Education, including, for example, funding for work-study programs and Pell Grants. Entities that receive federal funding also sign an agreement requiring them to comply with FERPA's provisions, and therefore disclosures that are inconsistent with FERPA would violate those agreements, even if they were made to another federal agency such as the NLRB.

20. In addition to the loss of federal funding, institutions who do not comply with FERPA's student privacy protections risk legal actions by the Department of Education, including claims seeking injunctive relief from a court preventing the disclosures. Because a key purpose of FERPA is student privacy, the Department has in the past sued institutions to prevent disclosure of FERPA protected information. *United States v. Miami Univ.*, 294 F.3d 797, 806 (6th Cir. 2002).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 23, 2021

LeRoy S. Rooker

Exhibit B

The Members Run This Union

Kenyon College Student Workers Strike for Union Recognition

Photo: John Ortiz Vargas

June 1, 2021

Gambier, OH

On Monday, April 26, around thirty “apprentice teachers” at Kenyon College went on strike. The teachers, undergraduates who help teach classes in exchange for an hourly wage of just over $10, were joined the next day by more than 140 more members of the Kenyon Student Worker Organizing Committee (K-SWOC), a UE affiliate.

K-SWOC, which began organizing in the spring of 2020, has signed up over 60 percent of the undergraduate student workers at the college. K-SWOC members do a wide variety of work for the college. In addition to apprentice teachers, K-SWOC members include resident hall assistants, lifeguards, and workers at the library, film center, farm, and greenhouse. If recognized, they will become the first labor union in the U.S. to represent all undergraduate student workers on a college campus.

During the strike, which lasted two weeks, student workers received an outpouring of support from the community, in particular from faculty members and members of UE Local 712, which represents Kenyon's skilled trades maintenance workers. Despite the administration threatening to call law enforcement to intimidate striking student workers on the fourth day of the strike and supervisors starting a back-to-work movement in some workplaces, K-SWOC only ended the strike due to the conclusion of the academic year — not because they were forced back to work.

The strike came hours after the administration dismissed K-SWOC's proposal to hold a privately-administered secret ballot election to determine union recognition. Unlike most workers, undergraduate student workers cannot rely on the right to win union recognition through an National Labor Relations Board election. Although the NLRB ruled in 2016 that graduate employees at private universities are, in fact, workers, unions representing both graduate and undergraduate student workers avoided bringing any cases to the NLRB during the Trump administration, fearing that Trump’s anti-worker appointees would use them as an opportunity to overrule the 2016 case.

However, with President Biden’s announcement on May 26 that he will nominate labor lawyer Gwynne Wilcox to fill an empty NLRB seat, and with anti-worker board member William Emanuel’s term expiring in August, the NLRB is expected to become more worker-friendly by the end of this year.

Photo: John Ortiz Vargas

In response to the administration's behavior during the end-of-semester strike, K-SWOC has filed multiple unfair labor practice charges against the college. Although the administration has still refused to recognize the union, K-SWOC members are looking forward to joining thousands of private undergraduate and graduate student workers across the country in organizing in their workplaces under a more friendly National Labor Relations Board.

K-SWOC members say they are ready more than ever to fight to secure their union and better lives for all student workers at Kenyon. As **Michelle Hanna**, a junior Arabic Language Apprentice Teacher (AT), said,

> I've got every strike announcement flier, picket packet, and 'Recognise K-SWOC' poster from the past semester hanging front and center in my room back at home. When I see them I am reminded of all the incredible work we've done so far and I feel so proud of this campaign. I'm excited to continue organizing with the other leaders in my shop this summer in preparation for the upcoming NLRB election!

More:

- Read coverage of the strike at LaborPress.org ***(https://www.laborpress.org/ohio-college-student-workers-go-on-historic-strike-for-union-recognition/)*** and InsideHigherEd

(https://www.insidehighered.com/news/2021/05/04/kenyon-student-workers-escalate-protesting-favor-union-recognition).

- During K-SWOC's one-day strike on March 16, *Jacobin* interviewed leaders of both K-SWOC and UE Local 712 ***(https://jacobinmag.com/2021/03/kswoc-kenyon-college-student-workers-union-strike/)***.

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Exhibit C

Kenyon

Message from President Decatur

President Decatur shares a message with the Kenyon community regarding recent campus events.

BY **Sean Decatur (https://www.kenyon.edu/news/archive/?filters[author]=sean-decatur#page)** DATE **May 5, 2021**

Dear members of the Kenyon College community,

As I am sure you are aware, a group of students has been striking on behalf of the Kenyon Student Worker Organizing Committee (K-SWOC) for 10 days. We do not know when this strike will end. My understanding is that the primary demand of this strike is to negotiate a recognition agreement for a union of student workers at Kenyon. You may recall that a special committee of the Board of Trustees considered K-SWOC's request for voluntary recognition last fall, and after broad input and careful deliberation the Board and I concluded (https://www.kenyon.edu/news/archive/campus-work-update-college-declines-request-for-union-recognition/) that a union is not the appropriate means to fulfill our core educational mission and meet students' financial needs.

Last Wednesday, as a part of the strike activities, about a dozen students came to my office in Ransom Hall to stage a sit-in. I joined the group for a discussion, explaining my position that a wall-to-wall union of student workers is not right for a liberal arts college such as Kenyon. As I explained then, this is rooted in my belief that the fundamental relationship a college has with its students is educational, and that campus work exists to further that education and make it financially accessible to students across incomes. My perspective has been informed by my experience as both a faculty member and an administrator.

My first experience as a faculty supervisor of student workers was in the laboratory, where I collaborated with students on research and supervised their lab work. Some students worked for credit, some worked for pay, and the roles changed depending on the time of year. But regardless of whether the compensation was in the form of pay or

the time of year. But regardless of whether the compensation was in the form of pay or credit, the main objective was clear: This was an opportunity for students to learn —

about protein folding, about how to develop research from experimental observation to conclusion, about how to present data to a range of different audiences and about how to collaborate as a group of individuals united in common cause.

When I became an administrator, I had the opportunity to ensure not only rich learning experiences in the lab and classroom, but also that such experiences would be accessible to students regardless of their financial circumstances. At Kenyon, that has meant strengthening financial aid resources for students. Many Kenyon students receive work-study as a part of their financial aid packages. But the work they perform is tertiary to the aid and the educational experience. There is no clearer evidence of our commitment to that than our decision to continue to pay student workers when the pandemic made it impossible for them to earn their expected income last spring. We did so because the fundamental goal and mission of work-study is to provide financial aid for students. The College has an obligation to meet the financial need of its students, and it has taken meaningful steps (https://www.kenyon.edu/news/archive/campus-work-update-work-study-awards-adjusted-for-2021-2022-supplemented-with-additional-grants/) to meet that need, including making available emergency funds (https://www.kenyon.edu/news/archive/covid-19-update-financial-support/) for students who are not able to work.

Part of a Kenyon education is learning how to advocate for yourself and others, and over the past year Kenyon students have been remarkably effective in advocating for their needs in the wake of the pandemic, through both individual and collective action — payment for work they could not perform remotely or make up at a later date, adjustments to the pass/fail policy, increased wages for Community Advisors, changes to COVID-19 practices in the dining hall. These did not require third-party intervention or a collective bargaining process. All they required was an email and discussion of concerns. This kind of self-advocacy — communicating openly and honestly with faculty, peers, administrators and supervisors, either directly or through existing governance structures — is a powerful and effective skill to master.

The past 14 months have asked more of college communities than any in my career. Staff and faculty members have worked tirelessly to steer the campus through an unprecedented pandemic year, and they have done so with tremendous skill, dedication and passion. I recognize that, while we share a commitment to supporting

dedication and passion. I recognize that, while we share a commitment to supporting peaceful protest, a strike is by definition disruptive, and that staff have found

themselves in unfamiliar and sometimes difficult positions this semester. As we turn toward the final days of an especially demanding semester, it is important that we recognize the employees who have brought us this far.

The past 14 months have also deeply strained the Kenyon community, opening long-standing wounds and causing fresh injuries. As Kenyon's president, I own a share of responsibility for the erosion of trust we have experienced in these times. But the responsibility is not mine alone. Neither is the path to community repair. In my eight years at Kenyon, I have repeatedly stated that we are an imperfect institution, sometimes falling short of our aspirations, much as we are all imperfect individuals striving to improve ourselves and others around us. Our work here is neither to accept imperfection nor to celebrate our progress, but to acknowledge the work that needs to be done and then set about on a path of improvement.

While the strikes this spring are the first I have experienced as Kenyon's president, they are not the first that have affected me personally. Some of the defining memories of my childhood involve strikes: my mother was a teacher in the Cleveland Public Schools, and she navigated as a single parent two extended strikes in the 1978-79 and 1979-80 school years (and another after I had gone off to college, in 1988-89). I believe in and understand the importance of unions, and at the same time I continue to believe that a wall-to-wall union of student workers is not appropriate for an undergraduate college. I also continue to have faith in the Kenyon community's capacity to wrestle with complex issues, consider multiple viewpoints and find a way forward.

Yours truly,

Sean Decatur
President

Gambier, Ohio 43022 740-427-5000

Exhibit D

Kenyon

Kenyon College Course Catalog 2021-22

Requirements for the Degree

NOTE: While faculty members and administrators stand ready to counsel students about degree requirements, the final responsibility for meeting the requirements rests with each student.

Students must fulfill the following requirements in order to earn a bachelor of arts degree at Kenyon (https://www.kenyon.edu/directories/offices-services/registrar/resources-for-students/requirements-to-participate-in-commencement/).

Jump to:

1. Major

The student must successfully complete all requirements of one major course of study including the Senior Capstone. (See The College Curriculum)

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2. Credits

Sixteen (16) Kenyon units (128 semester-hours or 192 quarter-hours) are required. Of these, a minimum of 8.00 units must be earned at Kenyon on a letter-grade basis. Above this minimum required, the student may include a maximum of 3.00 Kenyon units earned at summer school, a maximum of 0.50 unit of credit from physical education courses, and a maximum of 3.00 units earned on a student-chosen pass/D/fail and credit/no credit basis. (See also Transfer Credit and Grades and Credit)

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3. Residency

Eight semesters of full-time undergraduate enrollment (1.50 units or more) are required. A minimum of four of these semesters, including the senior year, must be completed at Kenyon College, on the Gambier campus.

Memo on Residency Requirement Flexibility (https://blogs.kenyon.edu/campus-report/post/memo-on-residency-requirement-flexibility/)

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4. Grade point average

In order to graduate, the student must earn an overall minimum grade point average, at Kenyon College, of 2.00 ("C"). A minimum of 2.00 is also required for each major course of study. Like most other colleges and universities, Kenyon is concerned only with the grade point average earned in residence with Kenyon faculty, not with the average earned elsewhere. (See Transfer Credit)

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5. Credits outside the major

The student must earn 9.00 or more units outside the major department; or, if there is more than one discipline in the department, the student must earn 7.00 or more units outside the major department as well as 9.00 or more units outside the major discipline. (A discipline is a traditional area of academic study.)

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6. Diversification

By the time a student graduates, she or he must complete at least 1 unit, within at least one department, in each of the four divisions.

In fulfilling this requirement, students should pay careful attention to the relationships among disciplines, departments, and divisions. For example, 0.50 unit in MUSC (music) and 0.50 unit in ARTS (studio art) will not together satisfy a distribution requirement, because these two disciplines, though in the same division, are in separate departments. The charts (https://www.kenyon.edu/directories/offices-services/registrar/course-catalog-2/administrative-matters/the-college-curriculum/#guide) summarize the distinctions among disciplines, departments, and divisions.

Students may earn 1.00 unit in a division by combining a course from an interdisciplinary program with an appropriate departmental course—but only if the interdisciplinary course is "cross-listed" in a department in this catalog. For example, ENVS 112, Introduction to Environmental Studies, is listed not only in the environmental studies section of the catalog but also in the biology section; thus, ENVS 112 may be paired with any 0.5 unit biology course to satisfy the natural-science requirement. In cases where all of the courses in an interdisciplinary major or program fall clearly within a single division (Neuroscience within the science division, Women's and Gender Studies within the social sciences division) 1.00 unit of course credit within that interdisciplinary program may be used to satisfy the divisional requirement. For specific interdisciplinary courses that count toward the fulfillment of diversification requirements, please refer to the Registrar's Office web page.

Courses taken to satisfy the quantitative reasoning requirement or the second language requirement may be counted toward the satisfaction of the appropriate diversification requirement. Courses that count toward the completion of one diversification requirement may not be counted toward a second diversification requirement.

Advanced Placement courses will not satisfy this requirement.

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7. Second language

Students must demonstrate a level of proficiency in a second language equivalent to one full year of introductory college study. They may meet this requirement in any of the following ways:

(a) by earning language credit in a course in the Kenyon Academic Partnership program

(b) by earning a score of 4 or 5 on any Latin Advanced Placement examination; or by earning a score of 3 or better on the College Board Advanced Placement test in a second language or literature

(c) by earning a score of 540 or higher on an SAT II modern language test

(d) by achieving a satisfactory score on a placement exam administered during Orientation

(d) by completing an introductory-level modern or classical language course at Kenyon

(f) by obtaining transfer credit for coursework that completes the equivalent of a year or more of language study at the transfer institution as determined by the registrar and the relevant department(s). Students may complete the equivalent of a year or more of language study at the transfer institution by transferring credit for the last semester (or final session) of a one-year (or longer) sequence. Transfer credit must be pre-approved by the registrar and the chair(s) of the relevant department(s), who must confirm in advance that the proposed course meets the departmental standard.

(g) by providing documentation that is satisfactory to the registrar and/or the Committee on Academic Standards, such as an ACTFL Oral Proficiency Interview certificate or STAMP test, that indicates they have achieved proficiency equivalent to one year of introductory college-level study

(h)by earning a score of 4 or higher on an International Baccalaureate HL or SL exam in any

(4) by earning a score of 4 or higher on an International Baccalaureate HL or SL exam in any language.

If the student seeks to meet the requirement through study of a language that is not offered at Kenyon, the student is responsible for providing documentation that is satisfactory to the registrar. Likewise, if a student seeks to meet the requirement through an off-campus study (study-abroad) program other than one of the Kenyon-approved programs, the student must provide documentation that is satisfactory to the registrar. Because Kenyon's introductory modern languages courses are taught as a single, year-long curriculum, it is not possible to take one semester of a language at another institution and complete the requirement by taking a second semester at Kenyon.

Kenyon considers achievement of language proficiency important for many reasons, among them:

- Language study forms part of the traditional foundation to the liberal arts because it leads to the rigorous study of texts in the original across many disciplines.
- Language study increases understanding of one's native language and of language in general.
- Language study provides insight into other cultures and cultural differences.
- Language study enables students to function in a global context.
- Knowledge of a foreign language increases one's desirability as a job candidate, particularly for leadership positions.
- Foreign language study requires structured learning and can therefore improve study skills.

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8. Quantitative reasoning

The student must earn a minimum of 0.50 Kenyon unit of credit in a course, or courses, designated as meeting the quantitative reasoning (QR) requirement. These courses are marked "QR" in the course catalog. Advanced Placement courses will not satisfy this requirement.

Learn about transfer credit to fulfill the QR requirement at Kenyon.

In order to transfer credit to fulfill the QR requirement, a student must present to the Kenyon registrar evidence that the proposed transfer course is equivalent to a specific Kenyon QR course (a list of and descriptions of which are available on the registrar's Web page). For any proposed transfer course that does not correspond directly to a Kenyon equivalent, the student must

supply explicit evidence that the course meets the specific criteria established for QR courses at Kenyon (e.g. it teaches students "to use statistical methods to analyze and interpret data," "to make inferences and decisions based on quantitative data," "to design experiments, and learn and apply data-collection methods," etc.) as a continuing theme in the course. In turn, the registrar will consult with the chair of the relevant department(s) to evaluate whether the proposed course is in fact equivalent to a Kenyon QR course or whether it adequately meets QR guidelines. The registrar, acting on behalf of the Curriculum Policy Committee, reserves the right to deny the transfer of QR credit. *In every instance, the burden of proof falls to the student to present evidence that the QR criteria have been met; this evidence should take the form of course descriptions, syllabi, copies of assignments, and examinations.*

Note: A course will satisfy the QR requirement only if it is designated a QR course for the semester in which it has been taken. Students should be aware that a particular course may change in character from one year to the next, so that it may count as a QR course during one semester but not during another.

Quantitative-reasoning courses may focus on the organization, analysis, and implementation of numerical and graphical data; or they may involve learning mathematical ideas, understanding their application to the world, and employing them to solve problems. In QR courses, students will learn some or all of the following:

- To use statistical methods to analyze and interpret data.
- To make inferences and decisions based on quantitative data--for example, by developing and testing hypotheses.
- To critically assess quantitative information--for example, by reading and critiquing journal articles with quantitative information and analysis.
- To design experiments, and learn and apply data-collection methods--for example, by developing data in laboratory exercises.
- To use mathematical reasoning and the axiomatic method--for example, by using systems of symbolic logic.

symbolic logic.

- To develop and use mathematical models—for example, to predict the behavior of physical, economic, or biological systems.

- To learn and apply the basic ideas of probability, chance, and uncertainty.
- To understand and apply concepts in algorithms and computer programming.
- To communicate quantitative information and mathematical ideas—for example, by constructing and interpreting graphical displays.

A given QR course probably will not include all of these abilities, but every QR course will engage students in some of them. In courses identified with the QR tag, the use of quantitative reasoning is a major and continuing theme. Although the subject matter of QR courses will vary by department and discipline, the quantitative knowledge and skills developed will be applicable in a wide variety of settings.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

KENYON COLLEGE	)	
	)	
EMPLOYER,	)	
	)	
and	)	**CASE 08-RC-284759**
	)	
KENYON STUDENT WORKERS, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)	)	
	)	
PETITIONER	)	

PETITIONER'S SURREPLY MEMORANDUM IN OPPOSITION TO EMPLOYER'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, STAY RC PETITION AND MOTION FOR INDEFINITE EXTENSION OF TIME TO FILE STATEMENT OF POSITION

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INTRODUCTION

On November 8, 2021, the Union filed a Memorandum in Opposition to Kenyon College's Motion to Dismiss, or, In the Alternative, Stay RC Petition, and Motion for Indefinite Extension of Time to File Statement of Position. The Union's Memorandum established that:

1) The employer's employees are statutory employees, and that the case should proceed to hearing (Opposition at 11-23);

2) A stay is not appropriate to allow the employer to seek Board review of the Region's unit determination (id. at 23-24); and

3) The employer's claimed obligations pursuant to FERPA do not supersede the Board's authority and obligation to exercise its statutory duty to enforce the National Labor Relations Act ("the Act") (id. at 25-40).

On November 24, 2021, the employer filed a reply brief. Despite threatening a "long and expensive" hearing, the employer provided no law contradicting the legal and factual premises which are the basis for the Union's Opposition. For example,

- The employer cited no statute, regulation, or case law providing that FERPA supersedes or impairs the Congressional mandate that the Board enforce the NLRA pursuant to its terms, through investigations, hearings, and elections.

- The employer cited no facts or law that its claimed obligations pursuant to FERPA arose from anything other than its wholly voluntary decision to fund itself by accepting federal funds.

- The employer cited no legal authority undermining the overwhelming recent and on-point Board precedent and other authority providing that employees of colleges and universities are statutory employees protected by the Act, even if they are also students.

All that the employer offers are a press release from its president, a declaration from a former administrative employee following the revolving door from government to the private sector, and a wish that *Columbia Univ.,* 364 NLRB No. 90 (2016) and its progeny had never been decided. But all of these cannot obscure what the employer really wants, which is to delay this case long enough so that its political bedfellows can change the law to the employer's benefit. In the

end, all that the employer has is its express threat to use its deep pockets to make sure that the hearing in this matter is "long and expensive."

None of these provide any basis for granting either of the employer's motions. Accordingly, for the reasons set forth in the Union's Opposition, and, as set forth below, the employer's motions should be denied.

ARGUMENT

I. THE EMPLOYER'S FERPA ARGUMENTS ARE A RED HERRING ASSERTED FOR THE SOLE PURPOSE OF DELAYING THE HEARING AND CERTIFICATION OF THE UNIT, AND DEPRIVING THE EMPLOYEES OF THEIR RIGHTS UNDER THE ACT.

As noted, the employer does not deny that its decision to accept federal funds was a wholly voluntary decision regarding how to fund its operations. Nor does the employer deny that any conditions associated with that funding were the result of that same voluntary decision. The statutory provisions that the employer asserts do not apply to schools that do not accept federal funding. Accordingly, the "dilemma" in which the employer finds itself is of its own making, and is not the fault of the Board, the Petitioner, nor the Congress.

More importantly, the employer fails to identify anywhere in the Family Educational Rights and Privacy Act ("FERPA") where Congress provided that FERPA supersedes or limits the powers of the Board to enforce its statutory mandate. The employer, although repeatedly arguing that the Board is limited by FERPA, provides absolutely no authority in support of this argument. The employer fails because there is no evidence, statutory or otherwise, that Congress intended the provisions of FERPA to supplant or limit the undisputed authority of the Board to make rules, investigate petitions, hold hearings, and make unit determinations. There is no legislative history that Congress intended FERPA as an implied repeal of the NLRA. The employer is using FERPA to delay proceedings in this case, so that the employer can use that delay to frustrate the employees'

choice to organize as guaranteed by the NLRA. But Congress did not provide that FERPA could be used as a weapon by private employers to fight unionization of their workforces.

Unable to find any legal authority to support its position, the employer cites out of context language from the Sixth Circuit's decision in *United States v. Miami Univ.,* 294 F.3d 797, 806 (6th Cir. 2002). The Sixth Circuit, citing 20 U.S.C. § 1232i, noted that there are limits on the consequences an educational institution can face when it withholds information pursuant to FERPA. However, 20 U.S.C. §1232i simply provides that an educational institution's failure to provide information "shall not constitute sufficient grounds for the suspension or termination of Federal assistance." As this case does not involve "Federal assistance," the *Miami University* case and 20 U.S.C. § 1232i plainly do not support the employer's position.

In fact, if anything, 20 U.S.C. § 1232i supports the Union's position that nothing in FERPA impairs the Board's authority to enforce its rules. As 20 U.S.C. § 1232i demonstrates, Congress knew how to write a statute limiting the consequences that a school might face from its refusal to provide information. However, Congress chose to weigh in only on the effect of such a refusal on "the suspension or termination of Federal assistance." If Congress had intended that employers be immune from Board rules or the requirements of the Nation's labor laws, surely Congress would have said so. 20 U.S.C. § 1232i demonstrates that Congress knew how to impose such a limitation, and is evidence that Congress imposed no such limitation on an employer's obligation to obey rules and orders of the Board.

The employer complains that the conditions of its funding prevent it from complying with the Board's rules. However, as noted, nothing in FERPA restricts the authority of the Board to enforce its rules and orders. While the employer can choose not to comply with the Board's rules, relying on the arguments in its briefs, the Board can enforce its rules against parties who fail to

comply. 29 C.F.R. § 102.66(d) provides that

> If the employer fails to timely furnish the lists of employees described in § 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

The choice whether to provide the information required by the Board's rules belongs to the employer. And 29 C.F.R. § 102.66(d) provides notice of the consequences of failing to abide by the rules. As the U.S. Supreme Court has held employers are not excused from their legal obligations when "[t]he dilemma . . . was of the Company's own making. The Company committed itself voluntarily to two conflicting contractual obligations." *W.R. Grace & Co. v. Loc. Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 767 (1983). For the Board to excuse the employer from complying with the Board's rules and cede control of the unit certification process to a private employer would "undermine the federal labor policy." *Id*. at 771.

Exhibit A to the employer's reply brief re-formats the employer's legal arguments in the form of a declaration from a former government employee who apparently left the Department of Education for the greener pastures of the private sector.[1] The declaration fails to provide any facts or authority for the proposition that FERPA supersedes the Board's power and obligation to fulfill its statutory duties through enforcement of its rules. And the declarant cites no statutory provisions providing that FERPA's limitations on federal aid also limit the authority of other federal agencies, like the NLRB, to fulfill their statutory duties.

[1] The declarant's availability to consult with employers is touted on the website of the employer association, the American Association of Collegiate Registrars and Admissions Officers. https://www.aacrao.org/resources/ferpa/about-leroy-rooker/

Since FERPA does not limit the power of the Board or impliedly repeal the NLRA, what FERPA requires of those, like the employer, who accept federal funds is beside the point. The consequences of the employer's decisions vis-à-vis the information required by the Board can be litigated in another forum with the Department of Education. The Board should not accept the employer's plea to bail out the employer at the expense of employees who are simply attempting to exercise their statutory rights provided by the Act.

Even if the Board chooses to consider what FERPA prohibits or requires, the technical requirements of FERPA are irrelevant because, at this point, the employer has refused to provide the Board with *any information whatsoever,* even information which is indisputably within the scope of FERPA's definition of "directory information." Nothing in the declaration contradicts the premises of the Union's Opposition Brief, which are based on the language of FERPA as construed by the courts. The details of what constitutes "directory information" or a "policy or practice" pursuant to FERPA are entrusted to the courts, and not to former government bureaucrats retained to render opinions in favor of their private employers. Therefore, whether every piece of information required by the Board falls within declarant's definition of "directory information" is beside the point. The employer has given notice that it will provide nothing until this matter is fully litigated.

Unable to produce authority supporting its view that FERPA limits the power of the Board to enforce its statutory mandate, the employer makes the absurd suggestion that the Union should get written consent from the 600 employees in the unit. This argument is simply another attempt by the employer to evade the fact that the Board has independent authority to enforce the NLRA and is not limited by FERPA. It is the employer which is bound by FERPA, not the Union or the Board. And it is the employer which has the opportunity to fashion the rules of

disclosure by choosing whether or not to accept federal funds and by choosing what information to designate as "directory information."

If the employer and its expert are convinced of the rightness of their position, the employer should decline to make the required disclosures, suffer the preclusive effect required by 29 C.F.R. § 102.66(d), and defend its position on review after unit certification. The employer should not be permitted to have it both ways, refusing to produce the required information but suffering no consequences. Permitting the employer to have the benefit of delay, when there is not even an arguable basis for a stay, would constitute an abandonment by the Board of its statutory obligations.

II. THE UNION'S OPPOSITION BRIEF ESTABLISHED THAT THE EMPLOYER'S EMPLOYEES ARE STATUTORY EMPLOYEES, A FACT THAT WILL BE CONFIRMED BY EVIDENCE AT HEARING.

The Union's Opposition established that the employer's employees are statutory employees pursuant to the standard set forth in *Columbia Univ.,* 364 NLRB No. 90 (Aug. 23, 2016). (Opposition at 11-23). The fact that the employer repeatedly denies that its employees are covered by the Act does not detract from the undisputed evidence and precedent that support that they are covered. The arguments set forth at pages 5 through 10 of the employer's brief are a re-hash of arguments made by the employer in its motions. These matters have been addressed in large part by the Union's Opposition at pages 11 through 23.

The employer suggests that the employees are not statutory employees, citing *Goodwill Indus. of Tidewater, Inc. Emp. & Pub. Serv. Emps. Loc. Union 572, Laborers' Int'l Union of N. Am., AFL-CIO*, 304 NLRB 767, 768 (1991). However, *Goodwill Industries* is plainly not applicable here. In that case, the "clients" came to Goodwill Industries from referrals from the Virginia Department of Rehabilitation Services and were "disabled persons 'who need assistance

and support' to find a job." *Id*. at 768. The Board held that the employees were not covered by the statute because "the relationship is primarily rehabilitative." *Id*. That is not this case.

Further, application of *Goodwill Industries* in context of employees of colleges and universities was discredited in *New York Univ.*, 332 NLRB 1205, 1207-08 (2000) where the Board distinguished *Goodwill Industries*, writing:

> Clearly, the same cannot be said of the relationship that graduate assistants have with the Employer here, or of their working conditions. The physical limitations and needs of the Goodwill clients, and the special assistance they required, immediately distinguish them from the graduate assistants and evoke a profoundly different environment from that in which the graduate assistants work in an institution of higher education. The Goodwill clients' atypical working conditions contrast sharply with the working conditions of the Employer's graduate assistants. Indeed in some respects the graduate assistants' working conditions are no different from those of the Employer's regular faculty. And, certainly their working relationship with the Employer more closely parallels the traditional economic relationship between faculty and university than the atypical relationship between "clients" and Goodwill.

Id.[2]

The employees in this case are not disabled, and the evidence at hearing will establish that the employees are statutory employees covered by the Act. Clearly, *Columbia Univ*. and the other cases cited in the Union's brief involving colleges and universities provide support for classifying the employees in this case as statutory employees.

Despite these authorities, the employer contends that the fact that the employer is in the education business precludes application of the Act to the employees which are the subject of the petition. The employer attempts to buttress its case by presenting a press release from its

[2]*New York Univ.* is persuasive authority on this issue. Although *New York Univ.* was overruled by *Brown Univ.*, 342 NLRB 483 (2004), *Brown Univ*. was overruled by *Columbia Univ.,* 364 NLRB No. 90 (Aug. 23, 2016).

president; but cases are decided based on evidence, not press releases. The evidence at hearing will establish that the students are statutory employees.

III. THERE IS NO BASIS FOR STAYING A HEARING.

The employer's brief demonstrates that the employer has joined some of its sister institutions which have gone to war against their own employees to preclude them from exercising their federally guaranteed rights to organize. As expected, the employer yearns for the days of yore when "private" schools had *carte blanche* with respect to treatment of their employees and students. Plainly, the employer wishes to turn back the clock to an earlier time when both students and employees deferred to their masters and did as they were told.

As expected, under the pretense of "ensur[ing] that the Board has adequate evidence on these issues," the employer threatens that it will use its deep pockets to make sure the hearing will be "long and expensive." (Reply at 10). The employer's filings make clear that the employer will do anything to preclude their employees from exercising their statutory rights. The Board should not accede to the employer's requests and defer proceedings any longer, nor should the Region defer a hearing until the employer can waste more time seeking Board review.

"Justice delayed is justice denied."

CONCLUSION

Accordingly, Petitioner requests that the Employer's motions be denied, and that the matter proceed to a hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3d day of December, 2021, a true and correct copy of the foregoing was served via e-mail addressed as follows:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

KENYON COLLEGE	
Employer	
and	**Case 08-RC-284759**
UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)	
Petitioner	

ORDER DENYING EMPLOYER'S MOTION TO DISMISS OR STAY PETITION

On October 18, 2021, the United Electrical, Radio and Machine Workers of America (Union) filed a petition seeking to represent all hourly-paid student employees of Kenyon College (Employer).

On October 21, 2021, the Employer filed two interrelated Motions in this matter. In its first Motion, the Employer argues that the hearing, along with the due date for filing its Statement of Position and its Initial Lists, should be indefinitely postponed (Motion to Postpone). In its second Motion, the Employer argues that the Region should dismiss the petition, or, alternatively, stay the petition (Motion to Dismiss).

On October 29, 2021, I granted the Motion to Postpone insofar as I ordered indefinite postponement of the hearing that had been scheduled to begin on November 9, 2021 as well as the due dates for the Statement of Position and Responsive Statement of Position.[1]

In its Motion to Dismiss, the Employer contends that significant jurisdictional and federal privacy issues compel me to rule in its favor. I have duly considered the Motion to Dismiss, along with the Union's Response to the Motion to Dismiss, the Employer's Reply and the Union's Surreply. For the following reasons, I deny the Employer's Motion to Dismiss.

The underlying basis for the Motion to Dismiss is that the petition raises a jurisdictional issue that the Employer argues I should address and resolve before the processing of the petition can proceed. Specifically, the Employer urges that the National Labor Relations Board (Board) lacks statutory jurisdiction over the individuals in the petitioned-for unit or, alternatively, that the Board should decline to exercise jurisdiction here. If I decline to dismiss the petition, the Employer requests a stay pending the Board's resolution of the jurisdictional question. A stay is necessary, asserts the Employer, to avoid a potentially unnecessary and expensive hearing and possible election coupled with a "head-on collision" between the Board's election rules and the Family Educational Rights and Privacy Act (FERPA). The Employer also argues that, if an election is

[1] The Employer's Motion to Postpone had also requested an indefinite extension to post the Notice of Petition for Election. I declined to grant this aspect of the Employer's Motion to Postpone.

ultimately held, a stay will ensure individuals have full freedom of choice for or against union representation.

The Employer asks me to dismiss the petition on the basis that the undergraduate student workers do not meet the definition of "employee" under Section 2(3) of the National Labor Relations Act (Act). This case is inappropriate for summary disposition on this point because the determination of employee status under Section 2(3) involves a detailed factual analysis that must be undertaken on the basis of an evidentiary record developed by a hearing officer. In this connection, I note in particular that the Employer devotes several pages of its Motion to Dismiss discussing and then *factually* distinguishing the student-workers here from those at issue in *The Trustees of Columbia University*, 364 NLRB No. 90 (2016), who the Board found to be Section 2(3) employees.

The foregoing supports my conclusion that a full evidentiary hearing is required in order for me to render a decision. At the hearing, the Employer, who bears the burden of proof to demonstrate exclusion, must present evidence to substantiate the arguments it makes in its Motion to Dismiss. A hearing will also permit the Union to present its evidence, with the goal being that the record contains the full range of facts relevant to the Section 2(3) inquiry.

Similarly, for me to evaluate the Employer's argument that it would not effectuate the purposes of the Act to exercise jurisdiction here, I require a full factual record. As correctly pointed out by the Employer, the Board declined to exercise jurisdiction in *Northwestern University*, 362 NLRB 1350 (2015), a newsworthy case involving student football players. What the *Northwestern University* Board emphasized, however, was that its determination was "based on the facts in the record," and future changes to those facts could mean a different outcome jurisdictionally-speaking. Id. at 1355. Sworn testimony and other hearing evidence are the best means for me to judge whether there is merit to the Employer's argument that exercising jurisdiction here would not promote stability in labor relations.

The Employer raises several important points of consideration regarding the student-workers, including the nature of their work, work schedules, job tenure, renumeration and their relationship with the Employer. I have simply concluded that these issues call for a full factual record, rather than the pre-hearing dismissal of the petition based on the Employer's arguments that are not supported by record evidence.

The Employer alternatively motions for a stay of further proceedings in the matter, citing three reasons. I address each in turn.

At the outset, I note that the Employer's request for a stay is made pursuant to § 102.67(j) of the Board's Rules and Regulations (Rules). However, §102.67(j) addresses party requests for extraordinary relief *before the Board*, not before a Regional Director. The statute also requires the Region to proceed with the processing of a petition unless a stay is "specifically ordered by the Board." 29 U.S.C. § 153(b). Notwithstanding the foregoing, I will rule on the Employer's request for a stay and do so under the standard provided for in § 102.67(j)(2), namely, "[r]elief will be granted only upon a clear showing that it is necessary under the particular circumstances of the case."

Echoing its assertions regarding the Section 2(3) status of the petitioned-for workers, the Employer argues that I should stay the processing of the petition to allow the Board to decide the jurisdictional question. Proceeding in this manner, according to the Motion to Dismiss, could obviate the need for a lengthy and expensive hearing were the Board to determine either that the student-workers are not employees under the Act or that it would not effectuate the purposes of the Act to exercise jurisdiction here.

I am not persuaded that what the Employer urges is the best course of action. As discussed above, the determination of both Section 2(3) status and whether to decline jurisdiction are fact-intensive and case-specific endeavors. Without a fully developed hearing record, the Board will have no way to analyze and weigh the facts in order to decide the jurisdictional question the Employer is raising. Even in those situations when a hearing has occurred, the Board has shown that it requires a complete record to make its determination.[2] Therefore, rather than potentially eliminating the need for a hearing, granting the Employer's motion for a stay would simply delay the hearing.

Pratt Institute, 339 NLRB 971 (2003), relied on by Employer for a stay, is factually distinguishable. There, the Board had granted requests for review in two cases[3] that were similar to *Pratt*, both of which had fully developed factual records. The *Pratt* Board reasoned that a stay of the hearing was warranted because the Board's decision in the other cases may moot the need for a hearing and election in *Pratt*. To the contrary here, I am not aware of any petitions pending before the Board on what the Employer describes as the novel issue of exclusively undergraduate, student bargaining units. Furthermore, the *Pratt* Board granted a stay based in part on the guidance that *Brown* and *Columbia* would provide to the *Pratt* parties. The instant matter will not benefit from similar guidance because no such cases currently exist. The Board also granted a stay in *Pratt* at a time before § 102.67(j)(2) required a moving party to make a "clear showing" that extraordinary relief was "necessary under the particular circumstances of the case."

For the reasons stated above, I do not find that the Employer has made a clear showing that a stay is necessary. If anything, a stay will only cause further delay in the processing of the petition.

Next, citing concerns about worker free choice, the Employer maintains that a stay is necessary here because of the rapid turnover of student workers. The Employer predicts a scenario whereby ballots could be impounded pending a final ruling on the jurisdictional issue by the Board, risking an election outcome that reflects the views of individuals who no longer work for the Employer.

While perhaps an initially appealing argument, if a Regional Director granted a stay in every case where there was even the slightest risk that ballots may have to be impounded, stays would be the rule as opposed to the extraordinary remedy described in §102.67(j). In advancing its arguments, the Employer also ignores the rights of the workers who are currently employed and

[2] See, *Black Hills/Colorado Electric Utility Company, LP*, 27-UC-229 (August 26, 2011) (remanding case to the Regional Director to reopen the record to take evidence on "whether and when the remaining employees were hired, what duties they actually perform, and any other evidence relevant to the merits of the unit clarification issue"). See also, *Austin Maintenance & Construction, Inc.*, 28-RC-266671 (May 28, 2021) (ordering the Regional Director to reopen the record because even though "the [e]mployer was precluded from litigating the propriety of the petitioned-for unit, the Regional Director was still obligated to find the unit appropriate based on some record evidence").
[3] *Brown University*, Case 1-RC-21368 and *Trustees of Columbia University*, Case 2-RC-22358.

want a say in whether or not to be represented by a union. Furthermore, I do not find the cases cited by the Employer in support of its argument to be persuasive: those cases all involve scenarios where the employer's employee complement was either dramatically increasing or decreasing in size. Even assuming what the Employer states in its Motion to Dismiss to be true – that there is significant turnover in its workforce from semester to semester – that is a matter of identity, not quantity.

I therefore conclude that the Employer has not met its burden to make a clear showing that a stay is necessary to guarantee worker free choice.

I now turn to the Employer's argument that a stay is required to avoid intrusions into student privacy and prevent a "head-on collision" between the NLRB election rules and FERPA. I disagree with the Employer's assessment that a stay is necessary. I recognize that FERPA will present certain procedural challenges in this case, but the Employer's compliance with that statute can be achieved while at the same time meeting its obligations under the NLRA. And this can be accomplished without the Employer risking the waiver of its rights under the NLRB election rules. The possible head-on collision can be avoided.

As recognized by both Parties in their filings, FERPA contains mechanisms pursuant to which student information can be lawfully disclosed by an educational institution. The Region will work diligently and creatively with the Parties to explore and take advantage of the avenues that FERPA itself provides for the lawful disclosure of student information.[4] On the NLRA side, the Region can process the petition in accordance with the Board's Rules, using its discretion regarding deadlines where appropriate. Simply put, processing the petition pursuant to the Board's Rules and within the confines of the Employer's obligations under FERPA is doable. Petitions involving similar educational institutions for units where FERPA was implicated have been processed, including at least one that proceeded to a pre-election hearing.[5]

Therefore, in order to address the Employer's valid concerns about protecting student privacy and not running afoul of FERPA and the similarly valid interest of both Parties in connection with the timely processing of the petition, I hereby ORDER a status conference to take place on **Thursday, May 5, 2022 at 10:00 a.m**. via Zoom. At that time, the Parties shall come prepared to discuss the following matters:

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[4] I find unfounded the Employer's fear that a subpoena seeking, for example, information constituting the Initial List is not a "lawfully issued" subpoena, thereby leaving the Employer unmoored from FERPA's safe harbor in 20 U.S.C. § 1232g(b)(2)(B) if it complies with such a subpoena. Section 11(1) of the Act authorizes subpoenas for evidence "that relates to any matter under investigation or in question." The information sought by a subpoena need only be "reasonably relevant" to an inquiry that is "within the authority of the agency." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); see also *NLRB v. Line*, 50 F.3d 311, 314 (5th Cir. 1995). A subpoena seeking such information as the names, work locations, shifts and job classifications contained in the Initial List are reasonably relevant to the agency's authority to investigate the petition and resolve questions of employee status and unit appropriateness, among others.

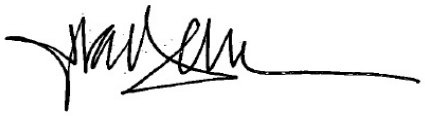
[5] See, e.g. *President and Fellows of Harvard College*, 01-RC-186442 (stipulated election agreement October 21, 2016); *Trustees of Clark University*, 01-RC-290362 (stipulated election agreement March 7, 2022); *Trustees of Dartmouth College*, 01-RC-290146 (stipulated election agreement February 18, 2022); *Fordham University*, 02-RC-291360 (stipulated election agreement March 28, 2022); *Massachusetts Institute of Technology*, 01-RC-289879 (stipulated election agreement March 1, 2022); and *Trustees of Grinnell College*, 18-RC-228797 (Decision and Direction of Election November 5, 2018, subsequent to pre-election hearing).

1. The due date of the Employer's Statement of Position and the Union's Responsive Statement of Position.
2. Regarding the Initial List: the due date and possible modifications to or elimination of the Employer's submission of an Initial List.
3. The Parties' presentation of evidence at the pre-election hearing and FERPA considerations.
4. Subpoena issuance to secure the student-worker information required in connection with the payroll list to check the showing of interest,[6] Initial List, pre-election hearing and/or Voter List.
5. In the event subpoenas issue for student-worker information, the notice the Employer is required to give to students/parents under FERPA, as well as the procedure by which the students/parents will file objections to the release of the subpoenaed information.
6. In the event a Decision and Direction of Election were to issue, the timing of the submission of the Voter List and any FERPA implications associated with the Voter List.
7. Any other issues that arise in connection with FERPA considerations concerning the processing of the petition.

Accordingly, for the reasons set forth above,

IT IS ORDERED that the Employer's Motion to Dismiss or Stay Petition is hereby denied.

Dated: April 19, 2022



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[6]In its Motion to Dismiss, the Employer notes that it is entitled to have the showing of interest checked against an employer-provided payroll list.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

KENYON COLLEGE

Employer

And **Case 08-RC-284759**

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)

Petitioner

AFFIDAVIT OF SERVICE OF: Order Denying Employer's Motion to Dismiss or Stay Petition and Notice of Rescheduling of Hearing, dated 4/19/22.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on 4/19/2022**,** I served the above-entitled document(s) by **e-issuance** upon the following persons, addressed to them at the following addresses:

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Sharon Zilinskas
Designated Agent of NLRB

Date
4/19/22

Name

/s/ Sharon Zilinskas

FORM NLRB-4701
(9-03)

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

KENYON COLLEGE, Employer

and

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), Petitioner

CASE 08-RC-284759

☒ **REGIONAL DIRECTOR**

☐ **EXECUTIVE SECRETARY**
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ **GENERAL COUNSEL**
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), Petitioner

IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☒ **REPRESENTATIVE IS AN ATTORNEY**

☒ **IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.**

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SIGNATURE: *(Please sign in ink)*

DATE: 4/21/22

[1] IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.